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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**No. 268.**

GEORGE HENRY WARREN, NATHAN B. WARREN, STEPHEN WHITNEY PHŒNIX, G. HARRY WARREN, AND THEODORE CHICHESTER, APPELLANTS,

vs.

WILLIAM KING, JOHN W. GARRETT, ROBERT GARRETT, T. HARRISON GARRETT, JAMES G. ROSS, THE OHIO AND MISSISSIPPI RAILWAY COMPANY, ALLAN CAMPBELL, AND THE FARMERS' LOAN AND TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

**FILED SEPTEMBER 20, 1880.**

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1 In the circuit court of the United States for the district of Indiana.

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| WILLIAM KING, JOHN W. GARRETT, ROBERT Garrett, T. Harrison Garrett, and James G. Ross<br>*v.*<br>THE OHIO AND MISSISSIPPI RAILWAY COMPANY, Allen Campbell, and The Farmers' Loan and Trust Company of the City of New York. | 4785. | Chancery. |

Be it remembered that heretofore, to wit, on the 17th day of November, A. D. 1876, at the November term of said court, before the honorable Walter Q. Gresham, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Now, on this 17th day of November, 1876, come the complainants, by George Hoadly, William T. McClintick, and Henry Crawford, their solicitors, and presented to the court their said bill of complaint duly verified by affidavit, and, in pursuance of the prayer of such bill, asked for the appointment of receivers of the mortgaged property in said bill mentioned. And said bill of complaint is in the words following, to wit:

To the honorable the circuit court of the United States within and for the seventh circuit and district of Indiana:

2 Humbly complaining, show unto your honors your orator William King, that he is a citizen and resident of the State of New Jersey, your orators John W. Garrett, Robert Garrett, and T. Harrison Garrett, partners under the firm name of Robert Garrett & Sons, that they are citizens of and resident in the State of Maryland, and your orator James G. Ross, who is an alien and a citizen and resident of the Dominion of Canada.

And your orators bring this their bill of complaint in their own behalf, as well as for others, as hereinafter stated, against The Ohio and Mississippi Railway Company, which is a body corporate, incorporated under the laws of the States of Indiana and Illinois, and exercising certain powers and franchises under the laws of the State of Ohio, and is a citizen of the States of Indiana and Illinois; Allen Campbell, who is a citizen and resident of the State of New York, and The Farmers' Loan and Trust Company of the City of New York, which is a body corporate, incorporated under the laws of the State of New York, defendants.

And your orators respectfully represent that the said Ohio and Mississippi Railway Company did, on December 24th, 1867, and does now, own and is possessed of a certain main line of railway extending from Cincinnati, in the State of Ohio, by way of Vincennes, in the State of Indiana, to East Saint Louis, in the State of Illinois, three hundred and

3 forty miles in length, together with a branch line from North Vernon to Jeffersonville, in the State of Indiana, fifty-three miles in length, and did, on January 1, 1875, acquire title to, and now owns, another

branch, called the Springfield division, extending from Shawneetown, by way of Pana and Springfield, to Beardstown, in the State of Illinois, a distance of two hundred and twenty-eight miles, together with the equipment, machinery, and fixtures, depots and depot grounds, tools and implements, and other property used and employed in the operation and maintenance of said railway and branches, and the tolls, income, and profits, together with the franchises thereof hereinafter more particularly described, all which main line and branches are maintained and operated as an entirety, and the equipment of said company is used indiscriminately upon said main line and branches, and the accounts of said company are mingled and not kept separately as between said main line and branches. And your orators further represent that upon the said 24th day of December, 1867, the said Ohio and Mississippi Railway Company, by deed of mortgage of that date duly executed, acknowledged, & recorded in the records of the several counties through which its said main line of railroad passes, conveyed in fee-simple to said Allan Campbell and Samuel W. F. Odell, trustees, and to their successors and assigns forever, all the said main line of railroad equipment, tolls, in-
4 come and franchises, in trust to secure the prompt payment at maturity of bonds to the total amount of six millions of dollars bearing date December 24th, 1867, and payable on the first day of January, 1898, with interest warrants or coupons attached thereto, payable semi-annually, at the rate of seven per cent. per annum, on the first days of January and July in each year, with the privilege to said company to issue for the purpose of constructing said Louisville branch, a further amount of bonds of like tenor, date, maturity, and rate of interest, to the total sum of nine hundred thousand dollars, of which bonds four millions were by said deed of mortgage expressly reserved for and appropriated to and delivered to the Union Trust Company of the City of New York, for the purpose of taking up and discharging the then existing mortgage indebtedness upon the eastern and western divisions of said main line of railroad extending, respectively, from said Cincinnati to said Vincennes, and from said Vincennes to said East Saint Louis, and in and by said mortgage it was also provided that in case of the issue and sale of said bonds not exceeding the total sum of nine hundred thousand dollars, for the purpose of building said branch to Louisville, the same should be also secured by a mortgage of said branch, which mortgage should also be and operate as a security for said six millions of dollars of bonded debt aforesaid. And provision was made in said mortgage in case
5 of the death of either or both of said trustees to fill the vacancy so caused by the appointment of another trustee in his place.

And your orators further state that said Odell has departed this life, but the vacancy thereby caused has not been filled. And your orators further state that, in addition to the prior mortgage indebtedness of said railway company, to secure which bonds of said issue were reserved and appropriated as aforesaid, and so delivered to said Union Trust Company, there are now outstanding, in the hands of lawful holders thereof, bonds of said company secured by prior liens on its property to the total amount of two hundred and seventy-six thousand dollars, and that of the bonds secured by said mortgage to said Allan Campbell, surviving trustee as aforesaid, there have been issued and sold by said company, and are now

outstanding in the hands of lawful holders thereof, bonds to the total amount of six millions six hundred and fifty-seven thousand dollars, being the residue of six millions eight hundred thousand dollars originally issued, and whereof bonds to the amount of one hundred and forty-three thousand dollars have been redeemed and cancelled by said company under and in pursuance of the provisions for a sinking-fund in said mortgage provided and contained, and whereof bonds to the amount of eight hundred thousand dollars were issued and sold to provide the means for the construction of said Louisville branch.

6 And your orators further state that by deed of mortgage duly executed, acknowledged, and recorded in the several counties through which said Louisville branch passes, said Ohio and Mississippi Railway Company, on June 23, 1869, conveyed said branch to said Campbell and Odell, as trustees, with like provisions as aforesaid, as to survivorship and the filling of vacancies, in trust, to subject said branched road more effectually to lien and incumbrance by way of security for said bonds, to said amount of six millions and eight hundred thousand dollars, and subject to the prior incumbrances thereon, viz, said sum of two hundred and seventy-six thousand dollars; said mortgage to said Allan Campbell, and Samuel U. F. Odell is the first mortgage upon said premises and property, and is an effectual security thereon for the said sum of six million six hundred and fifty-seven thousand dollars; in favor of, and to secure, the holders of the bonds issued and sold upon the said security, in said amount, and said Allan Campbell is the sole surviving trustee representing said security, but the holders of said bonds are very numerous, and for the most part unknown to your orators.

And your orators further represent that, upon the 25th day of March, 1871, by deed of second mortgage of that date, duly executed, acknowledged, and recorded in each of the counties in Ohio, Indiana, and

7 Illinois, through which said main line of railway, and said Louisville branch, pass, a true copy of which is hereto attached, and made part hereof, marked Exhibit A, said Ohio and Mississippi Railway Company, party of the first part, conveyed, in fee simple, to said Allan Campbell and Samuel U. F. Odell, trustees, of the second part, with like provisions as in said first-described mortgage contained for the appointment of a successor in case of the decease of either said trustees, all and singular the railroad of the said Ohio and Mississippi Railway Company, extending from the point of commencement thereof, in the city of Cincinnati, State of Ohio, to East St. Louis, on the Mississippi River, from which there is a connection by ferry with the city of St. Louis, in the State of Missouri, the said railroad being three hundred and forty miles, or thereabouts, in length, and running through the county of Hamilton, in the State of Ohio, and the counties of Dearborn, Ripley, Jennings, Jackson, Lawrence, Martin, Davies, and Knox, in the State of Indiana, and the counties of Lawrence, Richland, Clay, Marion, Clinton, and St. Clair, in the State of Illinois, and thence connected by ferry, across the Mississippi River, with St. Louis as aforesaid, and also the said branch railroad of the said party of the first part, connecting its said main line of railroad with the city of Louisville, which said branch railroad extends from the point of connection with the

8 main line of the Ohio and Mississippi Railway at North Vernon,

in Jennings County in the State of Indiana, running thence southwardly through the counties of Jennings, Jefferson, Scott, and Clark in said State to a point on the Ohio River in the city of Jeffersonville, opposite the city of Louisville, in the State of Kentucky, from which point the communication and connection with Louisville is by means of a ferry over the Ohio River, the length of such branch railroad being fifty-three miles, or thereabouts; together with the lands and roadway upon which the said railroad and branch railroad, respectively, are laid, and all the appurtenances thereof, and all the railway, rails, sidings, turnouts, bridges, ways and right of way and lands and premises whatsoever, with the improvements thereon belonging or appertaining thereto, or provided or used or intended to be used for the purposes of or in connection with the said railroad and branch, respectively, including all additions or improvements which may be made thereon or thereto by or for, or in respect of the adoption and provision of any new guage and any third rail which may be laid for such purpose in the route of said railroad and branch, respectively, or any part thereof, and all the depots and stations and depot grounds belonging or appertaining to said railroad and branch respectively,
9 and all lands and real estate provided, acquired, held, used or designed to be used for such depot grounds and all the building and repair shops, car-houses, engine-houses, and other buildings and structures whatsoever, belonging or appertaining to or used or designed to be used for or in connection with said railroad and branch, respectively, and all gravel beds and quarries used or designed for use for or in connection with said railroad and branch, respectively, or the completion, maintenance, or operation thereof, and also all the present and future rolling-stock of said railroad and said branch, respectively, and all locomotives, passenger-cars, freight-cars, and all other cars, carriages, tools, machinery, fuel, rails, and materials and things of whatsoever kind, (whether for or in connection with the road itself or its rolling-stock, or equipment or for work or machine-shops or construction or repairs of any kind) now belonging or appertaining to or used, procured or assigned for the purpose of or which may hereafter be acquired, used, or provided for the purposes of said railroad and branch, respectively, or the completion, maintenance or operation thereof; and also all lands and real estate of any and every description, whatsoever, now belonging or appertaining to the said party of the first part
10 wheresoever the same may be situated and all buildings and improvements thereon, and also all lands and real estate which the said party of the first part may hereafter acquire in the respective States of Ohio, Indiana, Illinois, Missouri, and Kentucky, or either of them, for the purposes of or in connection with its said line of railroad and branch railroad respectively, or any straightening or alteration of the line of the same, or for the purposes of or designed for depot grounds or stations or sites for shops, car houses or buildings, or improvements of any kind whatsoever used, or intended to be used, for the purposes of said railroad and branch respectively; and also all and singular the franchises, rights, privileges, and immunities, income, rents, tolls, profits, benefits, and advantages belonging or appertaining or to arise or accrue from the said railroad or branch railroad respectively, with the appurtenances thereof and the maintenance and operation thereof; and also all

and singular the properties, rights, leases, and leasehold interests, easements, franchises, privileges, contracts, and other things and interests whatsoever which the said party of the first part now owns or is entitled to, or shall at any time or times hereafter acquire, own, or become or be possessed of, or in any wise entitled unto, for or in respect of the connection or communication of the said branch railroad with and into
11 the city of Louisville, across the Ohio River by bridge, ferry, or otherwise from the terminus of said branch railroad at the Ohio River, in the city of Jeffersonville, opposite the said city of Louisville; In trust, however, to secure the prompt and punctual payment at their maturity of the principal and interest of bonds of said company, each for one thousand dollars, dated March 25, 1871, and bearing interest at the rate of seven per cent. per annum, payable semi-annually from April 1, 1871, evidenced by coupons or interest warrants therefor, payable on the first days of April and October in each year, said bonds being four thousand in number, and to the total amount of four millions of dollars, with the provision that in case of the non-payment of any interest on any of said bonds for any half year when demanded, and the same remaining unpaid for six months, and likewise in case of default for six months in the stipulated contribution to the sinking fund hereinafter referred to, the said principal sum, payable by such bond, should, without further demand or notice, become due and payable from the expiration of such six months from the day of such default with interest then accrued and in arrear.

And your orators further state that in and by said second mortgage, as was therein recited and provided, in order to provide a sinking
12 fund more effectually to secure the bonds issued under and entitled to the benefit of said mortgage, and for the ultimate redemption and payment thereof, said railway company covenanted, promised, and agreed to and with the said Campbell and Odell, as such trustees, and their successors, for and on behalf of all the persons and corporations who should at any time become the holders of any of the said bonds, that as long as any of said bonds should remain outstanding it would faithfully and punctually pay to said trustees, or their successors, as mortgagees in trust under said mortgage, as a sinking fund for the better security of said bonds, and to provide for the ultimate redemption and payment thereof, divers and sundry sums of money, and among the rest the sum of fourteen thousand dollars, upon the first day of October, 1876, and in default of such payments the said trustees were thereby authorized to sue for and recover said sums from said company, which said sums, when so paid, were therein provided and required to be a special trust fund in the hands of the said trustees for the benefit and security of the bondholders entitled to the benefit and security of said mortgage, to be by said trustees invested in the purchase at the current market price of bonds secured by
13 said mortgage, the same to be cancelled and surrendered to said company in such condition of cancellation, or if such bonds could not be purchased at par, then said special trust fund to be expended by said trustees in the purchase of other bonds, stocks, and securities for the benefit of said bondholders.

And your orators further state that all of said second-mortgage bonds have been issued and sold except one hundred and thirty-six thousand dollars thereof, which have been purchased and cancelled on account of said sinking fund, are outstanding in the hands of divers lawful holders

thereof, who are very numerous and for the most part unknown to your orators, being in all of bonds secured by said second mortgage the amount of three millions eight hundred and sixty-four thousand dollars now outstanding.

And your orators further state that said mortgage contains a condition of defeasance upon payment of the principal and interest of said bonds in the manner and at the times therein provided, and further provides that said company may retain possession of the said mortgaged premises until default in the payment of some part of said principal and interest, or in any part of the contributions to the sinking fund required by said mortgage.

14 And your orators further state that said mortgage is a valid and perfect security for said outstanding bonds upon said mortgaged premises junior only to said prior liens hereinbefore described, and which superior amounts, as hereinbefore stated, are the sums of two hundred and seventy-six thousand dollars and six millions six hundred and fifty-seven thousand dollars; and said Odell having departed this life, the same is represented as to the legal title only by said Allan Campbell as surviving trustee, the vacancy caused by the death of said Odell never having been filled.

And your orators further state that on the 30th day of January, 1875, by deed of mortgage of that date, duly executed and acknowledged and recorded in the records of the several counties through which said Springfield division passes, said Ohio & Mississippi Railway Company, party of the first part, conveyed in fee simple to the Farmers' Loan and Trust Company aforesaid, of the city of New York, trustee, all and singular the line of railroad in the State of Illinois, of about two hundred and twenty-two miles in length, theretofore belonging to the Springfield and Illinois Southeastern Railway Company, extending from Shawneetown, in the county of Gallatin, on the Ohio River, northwesterly through or touching at the towns of Fairfield, in Wayne County, Louisville, in Clay

15 County, Pana, in Christian County, Springfield, in Sangamon County, to Beardstown, in Cass County, on the Illinois River, together with all the right of way and all the real and personal property then used or appropriated for operating and maintaining the said line of railroad, including the engines, tenders, cars, tools, machinery, supplies, and all the rights, powers, privileges, franchises, and immunities which said last-named railway company before that time owned or possessed, and also all the real estate, improvements, rolling-stock, machinery, supplies, and other property which the party of the first part might thereafter acquire in respect thereto, and place upon the said line of railroad or appurtenant thereto for the efficient maintenance and operation of the same, and also all incomes, tolls, freights, rents, and profits accruing or to accrue therefrom, and all the rights, privileges, and franchises of the said party of the first part belonging or appertaining thereto, in trust to secure the payment at maturity of the principal sum of three millions of dollars, evidenced by three hundred bonds, each for ten thousand dollars, dated May 1st, 1875, and payable in the city of New York on the first day of November, 1905, with interest thereon from May 1st, 1875, at the rate of seven per centum per annum, payable semi-annually, each

16 of said bonds being exchangeable for ten coupon bonds of the

same tenor and effect and with like interest, evidenced by coupons or interest warrants, or, at the holder's option, for ten coupon bonds of the same date, tenor, and effect, except being for two hundred pounds sterling each, bearing interest at the rate of six per cent. per annum, and payable, principal and interest, in the city of London, England.

And your orators state that of the said bonds secured by said last named mortgage there have been issued and sold, and are now held by divers lawful holders, bonds to the total sum of one million nine hundred and fifteen thousand dollars, and that all or nearly all of the remaining one million and eighty-five thousand dollars of said bonds have been hypothecated by said company for its debts, and are now held as collateral to such indebtedness by divers lawful pledgees thereof, and your orators state that said holders and pledgees are numerous, and in large part are unknown to your orators.

And your orators state that the holders of said bonds heretofore described and secured by said first and second mortgages to said Campbell and Odell, trustees as aforesaid, claim and are entitled to the benefit of a second encumbrance or lien junior only to that of the holders of
17 the bonds so secured by said mortgage to said Farmers' Loan & Trust Company, to the city of New York, upon the property so conveyed by said last named mortgage, by reason of its being property acquired after the date of said first and second mortgages by the exercise of the franchises therein mortgaged.

And your orators further state that your orator William King is the holder of said bonds so secured by said mortgage to said Farmers' Loan & Trust Company to the amount of more than two hundred and fifty thousand dollars, and that your orators Robert Garrett & Sons are the holders of said bonds so secured by said second mortgage to said Allen Campbell and Samuel U. F. Odell to the amount of one hundred and seventy-six thousand dollars, and that your orator James G. Ross is the holder of overdue and unpaid coupons or interest warrants which were attached to bonds secured by said second mortgage to said Allen Campbell and Samuel U. F. Odell, and which accrued, matured, and became due upon October 1st, 1876, which coupons amount in all to the sum of fifty thousand dollars, and your orator said James G. Ross has made demand upon said company for the payment of said coupons, but the same has been refused. And your orators further state that said company has made further default in the payment of coupons upon bonds secured by said second mortgage, held by divers parties to your orators un-
18 known, to the amount of about ten thousand dollars.

And your orators further state that said Ohio and Mississippi Railway Company has made default in the performance of the obligations by it in said second mortgage to said Campbell and Odell assumed in respect to the sinking fund thereby provided for in this, to wit, that the said company did not on October 1, 1876, as it had in said mortgage agreed and bound itself to do, pay to said Campbell, said surviving trustee, the said sum of fourteen thousand dollars to be used and employed as therein provided, as and by way of a sinking fund to secure the bonds issued under and entitled to the benefit of said mortgage, or any part thereof, and your orators said James G. Ross and said Robert Garrett & Sons have demanded from said company since said first day of October,

1876, performance of its said covenant in this regard by payment of said sum to said Campbell, but the same has been refused.

And your orators further state that said company is insolvent, and that its property being situated in five States is exposed to foreign attachments, and that to protect their several interests in the premises so mortgaged from waste and spoil your orators will be forced to engage in a multiplicity of suits.

And your orators further state that said company is wholly without money or credit; that it has no means other than those derived from the maintenance and operation of its railway; that the unsecured floating debt of said company is about one million of dollars, evidenced by commercial paper which is constantly maturing and cannot now be paid without unlawful preferences, being acts of bankruptcy, and which if not paid will be at once followed by suits and writs of attachment, whereby the operations of said railway will be impeded and rendered difficult if not impossible, as well as dangerous, and that in its said insolvent condition it is exposed to a multiplicity of suits by way of foreign attachments and otherwise, and will be unable to pay its employees or to procure supplies necessary to its operation; that it is already largely indebted to its employees for wages and to others for necessary supplies obtained in its maintenance and operation until this date, and that the attempt longer to run said railway by said company will be attended with great danger to the lives of passengers and to property transported thereon, and that said company cannot earn and will not be able to pay the interest upon said second mortgage as it shall hereafter accrue, and therefore to pay said past due coupons so held by your orator the said James G. Ross and by others, as well as to provide for said deficiency in said sinking fund, and to pay said coupons that may hereafter accrue, and the principal sum payable by the said second mortgages which by the terms of the same will accrue and grow due after default for six months in the payment of such interest in whole or in part upon any of said bonds after demand of payment, and also in case of default for six months in any contribution required by said mortgage to said sinking fund, and that it will be necessary to sell said railway by the authority of this court and meanwhile to maintain and operate the same through the agency of a receiver to be appointed by and act under the control of this honorable court.

And your orators further state that large amounts of valuable assets of said company, which ought to be preserved for the benefit of said mortgage bondholders, are exposed to loss and waste by reason of the insolvent condition of said company and its total want of means or credit, and, among the rest, that said company, in June last, hypothecated to the National Trust Company of New York City, as security for a call-loan for the sum of one hundred thousand dollars, bonds of said issue so secured by said mortgage of said Springfield division to said Farmers' Loan & Trust Company to the amount of four hundred thousand dollars, and that said National Trust Company has called upon said railway company for the payment of said loan; that the latter is unable to respond to said call or pay said loan, and that said bonds, though worth much more than the amount of said loan, will be sacrificed by forced sale for one-fourth of their value, unless by the intervention of this honorable court the said waste may be prevented.

21 And your orators bring this their bill of complaint, not only in their own behalf, but also for and in behalf of all and any parties interested in said property who may see fit to unite herein and take the benefits hereof.

Wherefore, and forasmuch as your orators are remediless at law, and are entitled to relief only in equity, your orators bring this their bill of complaint, and pray that the said the Ohio and Mississippi Railway Company, Allan Campbell, surviving trustee as aforesaid, and The Farmers' Loan & Trust Company may be made defendants hereto; that process of subpœna may issue against each of them, and that they may be compelled to make answer to this bill; that a receiver or receivers may be appointed of said mortgaged railway, its branches, and other property, that the same may be preserved from waste and spoil, and maintained and operated in good order and for their proper private and public uses until they can be brought to sale, that said mortgages may be foreclosed, that said mortgaged premises may be sold, and that out of the proceeds of sale, in their just priority, all debts of said company secured thereon may be paid, including the said several debts due and owing to your orators, and for such other and
22 further relief as in equity and good conscience your *your* orators may prove themselves to be entitled to.

HOADLY, JOHNSON & COLSTON,
McCLINTICK, SMITH & GUTHRIE,
HENRY CRAWFORD,
*Solicitors for Complainants.*

UNITED STATES OF AMERICA,
*District of Indiana:*

M. H. Bloodgood, upon oath, says that he is agent for the complainants in this cause, who are non-resident of this judicial district, and not now present therein, and, on their behalf, affiant says that he has heard the said bill of complaint read and knows the contents thereof, and that the same are true as he verily believes.

M. H. BLOODGOOD.

Sworn & subscribed Nov. 17th, 1876.

J. D. HOWLAND, *Clk.*

We hereby enter ourselves security for costs herein.

H. CRAWFORD.

23 And afterwards, to wit, at the May term of said circuit court, on the 4th day of June, 1877, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Mess. Hoadley, Johnston & Colston, McClintick & Smith, & H. Crawford, esq., his solicitors, and, by leave of court, files his amended bill herein, in the words following, to wit:

Now come the said complainants, & by leave of the court here first had & obtained, amend their original bill in this cause filed in this court upon the seventeenth day of November, 1876, and for this purpose now file their amended and supplemental bill of complaint against the said defendants & against others, as hereinafter named and stated, & say:

That, except as hereinafter stated, they repeat and reaffirm each & every statement & charge, allegation, and averment of their said original bill of complaint.

That the said coupons or interest warrants owned & held by the said James G. Ross were acquired by him by assignment & transfer from the Bank of Montreal, a body corporate existing under the laws of the Dominion of Canada, which bank was the lawful owner & holder of said coupons, and acquired title thereto under the following circumstances, to wit:

The Ohio and Mississippi Railway Company was wholly unable, out of its means on hand, to pay and discharge the coupons or interest war-
24 rants upon its second mortgage which accrued & matured upon the first day of October, 1876, being the sum of between one hundred & thirty-five & one hundred & forty thousand dollars, but its officers & managers hoped & believed that they would be able, out of its income & the gains of its business, which they expected to increase by an anticipated increase of rates of freight & fare, to repay & refund any moneys that might be advanced to take up and pay said coupons, and to repurchase such coupons in a short time after said first day of October, 1876; and thereupon the president of said railway company applied to said bank to pay, discharge, and take up said coupons with its own means upon the promise of said president that said company would, out of its first net income accruing after said first day of October, 1876, pay, take up, & discharge said coupons to be taken up & paid by said bank, and upon the further promise and agreement of Daniel Torrance, who was then said president, to indemnify & save harmless said bank from loss by such advance; and thereupon, upon the consideration aforesaid, said bank did furnish and advance the money necessary for that purpose, &, through its own agents, it did, with its own means, take up and pay to the holders thereof coupons of the issue & description aforesaid, secured by the said second mortgage to the amount of one hundred and thirty thousand dollars, or thereabouts, of which there has been purchase' by said com-
25 pany from said bank the sum of about eighty thousand dollars, and there is now held and owned by said James G. Ross the residue of said coupons so taken up by said bank & transferred as aforesaid to him, being the amount named in their original bill of complaint of fifty thousand dollars.

And your orators aver that said coupons or interest warrants so held by said Ross are secured by the lien of said second mortgage; but that said Allan Campbell, surviving trustee of said second mortgage, denies & repudiates the lien of said coupons and affirms that they have been paid and that they are no longer secured thereby.

And the complainants further say that Samuel U. F. Odell, aforesaid, departed this life upon the 7th day of May, 1875, intestate and without issue, leaving as his legal representatives his heirs at law divers persons who are not resident within either of the States wherein said Ohio & Mississippi Railway is situated, and who, by reason of sex and want of sufficient age & experience, are not fitted to perform or capable of performing any of the trusts of said deed of trust or mortgage, but to whom by the decease of said Odell the title to the equal & undivided estate in common with said Allan Campbell, conveyed by said mortgage or deed of trust, has by descent by law been transmitted. Said heirs at law of said Odell

are the following named persons, to wit: his widow, Belinda Odell, and his mother, Odell, who are citizens of the State of New
26 York, and the heirs at law of his father, William D. Odell, who departed this life after said Samuel U. F. Oddell, but who are unknown to your orators.

And the complainants further say that by the laws of Ohio & Illinois respectively, the equipment and other movable property of said railway company are not realty, but the same constitute and are personal property, and as such are exposed to be detached from said railway by legal process.

And the complainants further say that, by the terms & provisions of said deed of trust or second mortgage, upon the death of said Odell it became & was the duty of said Allan Campbell, as surviving trustee, to unite with the president of said company in the selection and appointment of a temporary trustee to fill said vacancy, but that said Campbell has not performed said duty; and further, they say that upon the decease of said Odell it became & was the duty of said Campbell, and he was, as such surviving trustee, required by said mortgage or deed of trust, being the remaining acting trustee under the same, to call a meeting of the holders of the bonds secured thereby, giving at least three months' notice by advertisement published once a week in two daily papers in the city of New York, said meeting to be held in the city of New York for the
27 purpose of designating a trustee to fill said vacancy and to supersede any trustee appointed & selected by said Campbell & said president, & that although said Campbell did call said meeting, no such trustee has been appointed.

And they further say that said Campbell resides beyond the jurisdiction of this court, to wit, in the city of New York, and that he is now, & has since January 1, 1876, been commissioner of public works of the city of New York, an office of trust and profit, & of great importance, & involving onerous duties and great responsibility in the administration of the municipal government thereof, the discharge of which by him renders it impossible for him to perform the trusts wherewith, as such surrounding trustee, he is charged by said mortgage or deed of trust.

And they further say that the installment of the sinking fund required by said mortgage to be provided & paid to said Campbell & Odell, as such trustees, upon the first day of April, 1875, was paid by said company to them by check to their joint order, but the same was not invested by them, as required by said mortgage or deed of trust, although collected from the bank upon which it was drawn by virtue & on force of their endorsement of said check, and that thereupon said company brought, & at the time of the filing of said original bill of complaint was prosecuting, and
28 still is prosecuting, suit against said Campbell in the courts of the city of New York, for the amount of said check, the sum of thirteen thousand dollars.

Wherefore these complainants say that the said Allan Campbell did not nor could he execute the trusts of said mortgage, & that the intervention of this honorable court is necessary for their protection & the preservation of their respective rights in the premises.

And the complainants further say that by reason of the fact of the residence of said Allan Campbell within the State of New York, and that

The Farmers' Loan and Trust Company is a corporation of the same State, & that said last named company is the trustee of said mortgage or deed of trust of said Springfield division, said Allan Campbell cannot in the courts of the United States intervene & act for the rights, protection, & interests of the complainants in the said Springfield division, as they respectively may appear; and further, that said Allan Campbell does in fact repudiate & threatens to endeavor to destroy the value of the interests of your orators in the Springfield division; that he denies the legal validity of the purchase of said Springfield division, and is seeking to avoid the performance of his duty, as trustee under said second mortgage, to protect the interests of your orators, respectively, in said Springfield division.

29 And by way of supplemental bill they aver that, since the filing of their original bill of complaint, to wit, upon the first day of January, 1877, there accrued, matured, & grew due upon the said first-mortgage bonds, coupons, or interest warrants, to the amount of two hundred and thirty thousand dollars & upwards, which by reason of want of means the said company has been & is unable to pay; that the said first mortgage contains the same provisions with reference to the trusts to be executed, and to the filling of any vacancy as doth the said second mortgage, as hereinbefore described, and they repeat, with reference to said Campbell & Odell & as to the said first mortgage all the averments of this amended bill, and say that for the same reasons & by force of the same facts heretofore in this amended bill contained, alleged as to the said Campbell & Odell as trustees & the said Campbell as surviving trustee under the said second mortgage, the said Campbell has not executed and cannot execute the trusts wherewith he was charged by the said first mortgage, nor can the said heirs of said Odell; but they say that said Allan Campbell, as such surviving trustee of the said first mortgage, acting under & by virtue of said mortgage in co-operation with the holders of some of the bonds hereby secured, threatens & is about to commence proceedings for the foreclosure of said first mortgage and the sale of the premises

30 thereby by way of mortgage conveyed, which sale and foreclosure, if made, will greatly damage and injure these complainants, inasmuch as said mortgaged premises cannot be sold at judicial sale at present except at such a sacrifice as will impair their security, but that on the contrary these complainants are entitled to and now pray this honorable court to order payment of said past due interest upon said first-mortgage bonds out of the first moneys coming into their hands by the receivers appointed by this court, so as to secure and relieve these complainants from the danger of said foreclosure & sale, and so as to avert any danger from said proceedings & attack so threatened by said Campbell & his said associates.

And they further say that the said mortgaged property is of greater value than the amount of said first mortgage, & that said holders of said first-mortgage bonds are abundantly secure from loss, & therefore that any sale of said mortgaged property & premises made under the prayer of their original bill of complaint, or otherwise should be & ought to be, and they pray that it may be made subject to said first mortgage.

And they further say that upon April 1, 1877, there did accrue and grow due upon the bonds secured by said second-mortgage coupons or

interest warrants to your orators Robert Garrett & Sons, and the other holders thereof, a large amount of money, being the sum of about
31 one hundred & thirty-five thousand dollars, which sum said company did not pay, and has no means or assets in the hands of the receiver appointed by this court in addition to his other necessary expenditures & the payment of the said past due coupons of said first-mortgage bonds, to make payment thereof to these complainants, Robert Garrett & Sons, & the other holders of the said second-mortgage bonds.

And further they say that there did become & grow due upon April 1, 1877, the sum of fifteen thousand dollars required by said second mortgage to be invested by way of sinking fund, which sum said company did not pay, and to meet which there are no means in the hands of said receiver unless the same be withdrawn from moneys required to be applied to prior claims, or to necessary maintenance & the operation of said railway.

And your orators also state that on the first day of January, 1854, the Ohio & Mississippi Railroad Company, a corporation then existing by virtue of the laws of the State of Illinois, and owning and possessed of that part of the railroad of said defendant, The Ohio & Mississippi Railway Company, which extended from Illinoistown (now known as East St. Louis) to the east line of the State of Illinois, in the direction of the city of Vincennes, which corporation, by proceedings of reorganization & consolidation with another corporation created in the State of Indiana, afterwards became & now is the said defendant company, conveyed the said
32 part of said railway, with its appurtenances, known as the western division, with its equipment, toll, income, & franchises, by deed of trust or mortgage duly executed & acknowledged & recorded in the several counties of Illinois through which the said line of railroad passes, to Henry D. Bacon, a citizen & resident of the State of Missouri, David Leavitt & John L. Aspinwall, citizens & residents of the State of New York, as trustees, to secure certain bonds of said company, of which there are now outstanding & held by divers persons, bona fide holders thereof whose names are unknown to your orators, to the amount of ninety-seven thousand dollars. And your orators aver that the principal of said bonds, with large amounts of interest thereon, is past due and unpaid.

And your orators further aver that there are outstanding in the hands of divers persons, bona fide holders thereof, whose names are unknown to your orators, bonds of the Ohio & Mississippi Railway Company, a corporation created by the laws of the State of Illinois, to the total amount of one hundred & seventy-four thousand dollars, on which there are divers items of past due interest, the amounts whereof are unknown to your orators, and that said bonds consist of two classes, & partly of each of said classes, but how many of each class is unknown to your orators, said classes consisting of bonds secured respectively by two mortgages or deeds
33 of trust, both duly executed by said Illinois corporation, & acknowledged & recorded in the several counties of Illinois through which said line of railroad runs, both dated June the 9th, 1862, and conveying the line of railroad aforesaid, which was then owned by said company, from Vincennes to Bloody Island, upon the Mississippi River, with its appurtenances & equipment, tolls, income, & the franchises of said company, one to Joseph U. Alsop, George R. J. Bowdoin, and Samuel U. Comstock, citizens & residents of the State of New York, as trustees, to

secure the bonds therein described; the other to Samuel L. M. Barlow, a citizen & resident of the State of New York, & said Henry D. Bacon & Peter N. Ham, citizens & residents of the State of Missouri. And your orators also state that afterwards, by proceedings of reorganization and consolidation, said Illinois company became united with another company created by the laws of Indiana, and that thus thereby was created said defendant company.

Wherefore and forasmuch as your orators are remediless at law and can only be relieved in equity, your orators bring this their amended & supplemental bill against all the defendants to their original bill, to wit, against The Ohio & Mississippi Railway Company, Allan Campbell, surviving trustee, and The Farmers' Loan & Trust Company, and also against the said Belinda Odell, Odell, & Henry D. Bacon, David Leavitt, John L. Aspinwall, Joseph U. Alsop, George R. J. Bowdoin, Samuel U. Comstock, Samuel L. M. Barlow, and Peter N. Ham, trustees, as
34 aforesaid, and pray process of subpœna against them, and that they may answer the allegations of this amended & supplemental bill, and set up & state their several rights in the premises; that your orators may have as against all said defendants the same relief prayed for in their original bill; that the several priorities of claims of the said defendant's trustees may be ascertained and settled and marshalled as against the several portions of said railway, which they incumber; that successors may be appointed to act in lieu & stead of said deceased Odell, to execute the trusts wherewith he was charged, so that the interests of the holders of said first & second consolidated mortgages may be represented by separate trustees; that the default in payment of said first consolidated mortgage coupons may be redeemed and said coupons paid, and for such other & further relief as in equity & good conscience your orators may prove to be entitled to.

By HOADLEY, JOHNSON & COLSTON,
McCLINTICK & SMITH,
HENRY CRAWFORD,
*Solicitors for Complainants.*

35 And afterwards, to wit, at the May term of said circuit court, on the 29th day of September, 1877, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by counsel, and by leave of court file a supplemental amendment to their amended bill herein making the National Trust Company, a corporation and citizen of New York, a party defendant to this suit; and it being shown to the satisfaction of the court, by affidavit this day filed, that the bill herein is brought to enforce legal and equitable liens and claims against both real and personal property within the district of Indiana, and that the said National Trust Company is not an inhabitant of said district, nor found within said district, and do not voluntarily appear, it is ordered that the said defendant, National Trust Company, do appear in this court and plead, answer, or demur to said bill on or before the first Monday of November, 1877. And a copy of this order shall be served on said defendant. And said supplemental amendment to said amended bill is in the words following, to wit:

The said complainants, William King, John W. Garrett, Robert Garrett, and T. Harrison Garrett, and James G. Ross, by leave of the court first had, come and file this their supplemental amendment to their
36 bill of complaint herein; and thereupon said complainants say that heretofore, to wit, on the day of , and prior to the filing of the original bill herein, the said Ohio and Mississippi Railroad Company, by its proper officers, had made a loan of one hundred thousand dollars from the National Trust Company, a corporation and citizen of the State of New York, and as evidence of said indebtedness executed to said National Trust Company its promissory note for that amount, with interest at the rate of seven per cent. per annum, and as security for the payment of said note deposited with said National Trust Company the first-mortgage bonds of the Springfield and Southeastern division of said railroad of the par value of four hundred thousand dollars and of the actual value of two hundred thousand dollars at this time, which bonds are still in the hands of said National Trust Company as aforesaid.

That after the making of said loan the same was extended and renewed before the commencement of this suit; and since the commencement of this receivership, to wit, on the 26' day of January, 1877, an order was made by this honorable court authorizing the receivers, John King, jr., and Daniel Torrance, to further extend and renew the same, paying the same interest thereon, which was done, and the interest was paid up to the 1' day of May, 1877, by said receivers.

37 Complainants further aver that said receiver, John King, jr., has, within two or three days last passed, proposed to pay up all arrears of interest on said loan, and is ready and willing to pay interest on the same for any reasonable time in advance, and offers so to do.

But complainants charge that the said National Trust Company is asserting its right to sell said mortgage bonds for the payment of said debt, and intending and contriving to injure and oppress said railroad company, and to embarrass said receiver in the administration of his said trust and prevent him from paying the overdue coupons on the first-mortgage bonds of said company, as he has been by the court authorized and directed to do, and hoping thereby to assist the said Allan Campbell, trustee under said first mortgage, to force a foreclosure of the same, hath made a demand on said receiver for the immediate payment of said loan with interest, and hath served on said receiver a notice, a copy of which is filed herewith, that unless said loan and interest is paid on or before the third day of October, 1877, said $400,000 of bonds so held as security will be sold at the exchange sales rooms, in the city of New York, at public auction, for the payment of said claim, and that said receiver will be held liable for any deficiency.

38 And complainants aver and charge that said bonds so pledged for said loan are a very valuable part of the assets of said Ohio and Mississippi Railroad Company; that in value they are vastly in excess of the amount of said debt, and that if exposed to sale according to said notice they will be, and by said National Trust Company they are intended to be, sacrificed for a small part of their real value.

They further show that said trust is in a highly prosperous condition; that said receiver is now doing a business which will in a short time enable him not only to pay all overdue coupons, but will also enable him

to pay the floating debt of the company; and that if said threatened sale is postponed for days he will be able to pay said loan and redeem and save said bonds to the trust.

They further show that one of the prominent features of the bill on which the receivers were appointed in this suit was the emergency in reference to these very bonds which said National Trust Company was then threatening to sell and sacrifice, and the market value of which has appreciated very greatly since the commencement of this receivership.

That said National Trust Company has full knowledge that the entire property of said R. R. company is in the custody of the court, and
39 that under the present orders of the court said receiver is not authorized to pay said principal, but only the interest on said loan.

Complainants further aver that said National Trust Company is a non-resident of all of the districts in which said road runs, and in which proceedings have been commenced in this matter; and that it is a resident and citizen of the State of New York, and it is not found in any of the districts of Indiana or Illinois, Missouri or Ohio, and process cannot be served on it in either of said districts, and it does not voluntarily appear to these proceedings.

Wherefore complainants pray that said National Trust Company be made a party defendant in this suit; that an order be issued and served on said National Trust Company, requiring it to appear and answer the premises according to the statute in the case of non-resident defendants; that it be required to present its claims in reference to said loan and bonds to this court, and abide its order in the premises, and that in the mean time it be enjoined from offering said bonds for sale until the further order of the court, and that such further orders be made in the premises as equity may require.

HARRISON, HINES & MILLER,
*Of Counsel for Complainants.*

STATE OF INDIANA,
*Marion County, ss:*

William H. H. Miller, on oath says, he of counsel for complainants herein, and that the allegations of the foregoing amendment to the
40 bill herein are true, as he is informed and believes.

W. H. H. MILLER.

Subscribed and sworn to before me this September 28th, 1877.
[SEAL.] WILL J. MANNING,
*Notary Public, Marion Co., Ind.*

NEW YORK, *Sept.* 24, 1877.

JOHN KING, Jr., *Receiver of the Ohio and Mississippi Railroad Co., St. Louis, Mo.:*

DEAR SIR: You are hereby notified that unless the amount of the loan to the Ohio and Mississippi Railroad Co. is paid, with interest, on or before the 3rd *third* day of October next, at twelve (12) o'clock m., the collaterals held by us on said loan, viz, four hundred thousand dollars ($400,000), bonds of the Springfield division of the Ohio and Mississippi Railroad Company, will be sold at public auction at the Exchange Sales Rooms, 111 Broadway, by A. H. Muller and Son. and the proceeds ap-

plied to the payment of said loan and interest, after deducting the expenses of such sales, and you will be held for any deficiency there may be.

Yours, respectfully,

(Signed) NATIONAL TRUST COMPANY.
D. R. MANGAN, *Pt.*

41 And afterwards, to wit, at the May term of said court, on the 10th day of August, A. D. 1877, Allen Campbell, as trustee, &c., brought suit and filed his original bill against the Ohio and Mississippi Railway Company, William King, John W. Garrett, Robert Garrett, T. Harrison Garrett, and James G. Ross, which suit was numbered 5416, as shown by the following proceeding in said cause had on said 10th day of August, 1877, before the Hon. Walter Q. Gresham, judge.

ALLAN CAMPBELL, TRUSTEE,
*v.*
THE OHIO AND MISSISSIPPI RAILWAY COMPANY et al. } No. 5416. Chancery.

Comes the complainant, by Mess'. Baker, Hord & Hendricks, and W. H. Peckham, esq., his solicitors, and files his bill of complaint herein in the words following, to wit:

And afterwards, to wit, at the November term of said court on the 18th day of January, 1878, before Hon. Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause No. 5416 were had, to wit:

Comes now the complainant by counsel and by leave of court
42 files his supplemental bill herein in the words following, to wit:

And afterwards, to wit, at the November term of said court, on the 18th day of February, 1878, before the Hon. Walter Q. Gresham, judge as aforesaid, the following further proceedings were had in the above-entitled cause of William King et al., and numbered 4785, to wit:

Comes now Allan Campbell, by counsel, and files his answer to the bill of King et al. herein in the words following, to wit, and at the same time said Allan Campbell files his cross-bill against said King et al. herein, in the words following, to wit:

And now the said two causes of William King et al. vs. The Ohio and Mississippi Railway Company et al., No. 4785, and Allan Campbell vs. The Ohio and Mississippi Railway Company et al., No. 5416, being
43 both pending in said court, afterwards, to wit, at the November term of said circuit court, on the 9th day of January, 1879, before the honorable Thomas Drumond and Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

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| WILLIAM KING ET AL. *v.* THE OHIO AND MISSISSIPPI RAILWAY COMPANY, ALLAN CAMPBELL, ET AL. | 4785. | Chancery. |
| ALLAN CAMPBELL *v.* THE OHIO AND MISSISSIPPI RAILWAY COMPANY, WILLIAM KING, ET AL. | 5416. | Chancery. |

And now here come the parties, by their respective solicitors, and the Ohio and Mississippi Railway Company and John W. Garrett and others, defendants, having withdrawn their respective pleas to the cross-bill of the said Allan Campbell, filed in the said first-named cause, No. 4785, and the said railway company having also withdrawn its plea to the original and supplemental bill of the said Allan Campbell, filed in said cause secondly above-named and numbered 5416, it is therefore ordered that the said two causes above-named and numbered 4785 and 5416 respectively

44 be, and the same are hereby, consolidated as one cause, to be numbered 4785 on the docket, without prejudice to the rights of the complainants and cross-complainants in said causes respectively, but the rights of the complainants in the said first-named cause, and of the cross-complainant Allen Campbell in the same cause, and also the right of the said Allan Campbell as complainant in the said cause numbered 5416, secondly above-named, shall be preserved and not be deemed to be waived or impaired by this consolidation, but all such rights shall be respected, and may be asserted as if the said two causes were prosecuted to final decree as separate suits.

And the defendants have leave to answer said original and supplemental and cross-bills of Allan Campbell, trustee, within sixty days from the entry of this order.

45 And afterwards, to wit, at the November term of said court, on the 4th day of December, 1879, before the honorable Thomas Drummond and honorable Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled consolidated cause were had, to wit:

A petition of George Henry Warren, Edward H. Green, and others, owners of preferred stock of the Ohio and Mississippi Railway Co., having been heretofore filed on the day of , praying to be admitted as parties hereto, and for the other relief set forth in the petition, and the hearing of said petition having been fixed by the consent of all parties on the 31st day of October, 1879, before the circuit judge, at chambers in Chicago, and the various parties interested therein having appeared by their respective counsel, it was ordered that the petitioners should be admitted as parties defendant to the two causes herein consolidated, and it was agreed that the said petition should be taken and regarded as a bill or cross-bill or other pleading as the petitioners might on further advisement elect to make it; the parties to demur to such pleading or cross-bill and argument was then and there had upon the demurrer as if filed thereto on the said 31st day of October, 1879; and the petitioners having been made parties defendant to this cause as consolidated now file their answer to the bills of complaint herein, and also file their cross-bill

46 as preferred stockholders of the said company, and it is ordered that, with the consent of all the parties hereto, the said answer and cross-bill be filed as of the date of the 31st of October, 1879, and that the demurrer of the defendants to the said cross-bill be filed as of the 31st day of October, 1879, which is now done, and one of the said petitioners, Edward H. Green, a citizen of the State of Vermont, is hereby ordered to be made party defendant to said consolidated cause as a representative stockholder of the said company as of the 31st day of October, 1879, he waiving the service of all pleadings in said suit, and that he have leave to file his separate answer and cross-bill, if he shall be so advised, within thirty days after the entry of this order, and with the like effect as if the same had been filed herein on the 31st day of October, 1879, and the merits of the said answer and cross-bill, in connection with the other pleadings in the cause, having been submitted to the court on argument by the counsel of the respective parties on the 31st day of October, 1879, and on briefs, the questions involved therein are hereby reserved for the decision of the court hereafter.

And the said cross-bill of the said George Henry Warren and others, as preferred stockholders, is in the words following, to wit:

To the judges of the circuit court of the United States for the district of Indiana:

47 George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, and Peter Townsend, citizens and residents of the State of New York, and Edward H. Green, a citizen and resident of the State of Vermont, bring this their cross-bill of complaint against William King, who is a citizen of the State of New Jersey, John W. Garrett, Robert Garrett, and T. Harrison Garrett, who are citizens and residents of the State of Maryland; and James G. Ross, who is a citizen of the Dominion of Canada; the Ohio and Mississippi Railway Company, which is a citizen of the State of Indiana; Allan Campbell, who is a citizen of the State of New York, and The Farmers' Loan and Trust Company, which is also a citizen of the State of New York, the said parties defendant being the complainants or codefendants with your orators in the suit of King and others against the Ohio and Mississippi Railway Company and others, originally numbered 4785, and now consolidated in this cause, and thereupon your orators allege as follows:

All your orators except Edward H. Green are citizens and residents of the State *of the State* of New York, and the said Edward H. Green is a citizen and resident of the State of Vermont, and they bring this their bill as well in their own behalf as owners respectively of shares of the preferred stock of the Ohio and Mississippi Railway Company, being the consolidated corporation of that name, defendant herein, as on behalf also

48 of all other owners of such preferred stock who may come in and claim the benefit of this proceeding and contribute to the expense thereof.

First. Your orators are respectively owners of and holders of certificates for the number of shares of the preferred stock of said Ohio and Mississippi Railway Company following, to wit:

George Henry Warren of thirty-two hundred (3,200) shares; Nathan

B. Warren of two hundred (200) shares; Stephen Whitney Phœnix of two hundred (200) shares; G. Harry Warren of one hundred (100) shares; Theodore Chichester of one hundred (100) shares; James Renwick of two hundred (200) shares; Robert B. Minturn of four hundred (400) shares; John Minturn of four hundred (400) shares; Peter Townsend of five hundred (500) shares; and Edward H. Green of five hundred (500) shares.

Second. By an act of the legislature of the State of Indiana, passed February 14th, 1848, entitled "An act to incorporate the Ohio and Mississippi Railroad Company," certain persons therein named were constituted a body politic and corporate by the name of "The President and Directors of the Ohio & Mississippi Railroad Company," hereinafter referred to as the Ohio & Mississippi Railroad Company of Indiana; and such corporation continued thenceforth to exist under said incorporating act and the acts amendatory thereof, and particularly the acts of said State of Indiana, approved January 15, 1849; two acts, each approved February 13, 1851, and another act approved March 3, 1849, and under the laws of
49 said State of Indiana affecting said corporation, and with the powers conferred by said laws, and particularly by the acts above mentioned.

Third. By an act of the legislature of the State of Ohio, passed March 15, 1849, entitled "An act to aid the Ohio and Mississippi Railroad Company," the preamble of which recited the incorporation and organization of said railroad company in the State of Indiana in virtue of the act of February 14, 1848, and that to insure the completion of said railroad, it was necessary to confer upon said company power to construct the road from the line of the State of Indiana to the city of Cincinnati; it was enacted that the corporate powers granted to said Ohio & Mississippi Railroad Company by said act of Indiana incorporating the same were recognized, and that said company was thereby, to wit, by said act of Ohio of March 15, 1849, authorized to lay out and construct so much of said road as lay within the State of Ohio, with the same powers that were conferred upon railroad companies by the general law of the State of Ohio, to obtain the right of way and materials for the same.

And by an act of the legislature of the State of Ohio, passed January 24, 1851, entitled "An act to amend an act to aid the Ohio & Mississippi Railroad Company," it was in the third section thereof enacted that it was thereby declared that the intention of the first section of the act aforesaid, to which said act of January 24, 1851, was an amendment, was to recognize, confirm, and adopt the charter of the said company, as enacted by
50 the Indiana act of February 14, 1848, and as amended by the act of the same State of January 15, 1849; and the said charter was thereby, to wit, by said act of January 24, 1851, expressly recognized, confirmed, and adopted, so far as the same might be applicable to the State of Ohio; and that for certain other designated purposes, the said corporation should be governed by and have the same powers which were conferred upon railroad companies by the general law of the State of Ohio regulating railroad companies, passed February 11, 1848.

And said corporation continued to exist thenceforth in the State of Ohio under said acts of March 15, 1849, and January 24, 1851, and the laws of the State of Ohio affecting said corporation, and with the powers conferred by said acts and laws.

Third (*a*). By an act of the legislature of the State of Illinois, approved February 12, 1851, and entitled "An act to incorporate the Ohio & Mississippi Railroad Company, and for other purposes," certain persons therein named were constituted a body politic and corporate by that name, with power to locate, construct, and maintain a railroad commencing at Illinoistown, on the Mississippi River, and running thence on the most eligible route to the east line of the State of Illinois in the direction of the city of Vincennes, in the State of Indiana; and among the powers granted to said company by said act—by the 15th section thereof—power was given to it to unite its railroad with any other railroad then constructed,
51 or which might thereafter be constructed, either in Illinois or in Indiana, upon such terms as might be agreed upon between the companies so connecting, and for that purpose full power was by said act given to said company to make and execute such contract with any other company as would secure the objects of such connection.

And said corporation continued thenceforth to exist under said incorporating act and certain acts amendatory thereof, and particularly under acts passed June 22, 1852, February 11, 1853, and February 27, 1854, and under the laws of the State of Illinois affecting said corporation, and with the powers conferred by said laws, and particularly by the acts above mentioned.

Fourth. Pursuant to a decree made at the term of March, 1862, of the United States circuit court for the southern district of Illinois, in a suit there pending, wherein Henry D. Bacon and others were complainants, and said Ohio & Mississippi Railroad Company, of Illinois, and others, were defendants, ordering a sale of all the premises, property, and franchises described in a mortgage or deed of trust, being the so-called second mortgage, made by said company, dated January 1st, 1854, and in certain deeds of further assurance, made in pursuance of certain provisions thereof, all the property and franchises of said railroad company were sold on the second day of June, 1862, to the Ohio & Mississippi Railway Company, a corporation created by an act of the legislature of the State of Illinois, approved
February 5, 1861, for the purpose, as in said act recited, of purchas-
52 ing and taking a conveyance of all the railway property, rights, and franchises of the Ohio & Mississippi Railroad Company, incorporated by the act of said State approved February 12, 1851, or any part thereof, either by private contract or at any judicial sale thereof, and the sale of all such property and franchises to said railway company was duly confirmed by decree of said court, made at the term of June, 1862, and thereupon conveyance of the said property and franchises were made to it.

And said Ohio & Mississippi Railway Company thenceforth, and up to and at the time of the consolidation hereafter referred to, continued to exist under said incorporating act of February 5, 1861, and the laws of the State of Illinois affecting said corporation, and with the powers conferred by said act and laws of said State of Illinois.

Fifth. Pursuant to decrees made in and about the year , by the circuit courts of the United States for the southern districts of Indiana and Ohio respectively, in suits there pending, in each of which Edwin D. Morgan and others were complainants, and the Ohio & Mississippi Railroad Company and others were defendants, all the property and franchises of said company being the corporations created and organized under the laws

of Indiana and Ohio as aforesaid, subject to certain mortgage indebtedness in said decrees recited, were sold on the 9th day of January, 1867, to Allan Campbell and others, trustees of creditors and stockholders of the
53 said Ohio & Mississippi Railroad Company (eastern division), and such sale being afterwards and on the 22d day of May, 1867, confirmed by the court, conveyances of all such property and franchises of said railroad company were thereupon made to said Campbell and others, as trustees as aforesaid.

Thereafter, in virtue of, and in conformity to, the provisions of an act of the State of Indiana, approved March 3, 1865, entitled "An act to authorize, regulate, and confirm the sale of railroads; to enable purchasers of the same to form corporations and to exercise corporate powers," and for the other purposes therein recited, and also in virtue of provisions of an act of the State of Ohio, passed April 11, 1861, and entitled "An act to regulate the sale of railroads and the reorganization of the same," but especially with the view and purpose to adopt and make available so much of the powers and privileges granted by the 7th section of said act as were applicable to a corporation of Indiana possessing a railroad partly in that State and partly in Ohio, the said Allan Campbell and others, as such trustees as aforesaid, did make their certificate, framed according to the requirements of said reorganization statute of Indiana, and reciting the matters aforesaid and others, and as more fully set forth in a copy of said certificate hereto annexed and made part hereof as Exhibit A, and filed the same in the office of the secretary of state of Indiana on the 14th day of No-
54 vember, 1867, and in the office of the secretary of state of Ohio on the 26th day of November, 1867, and thereby became a body corporate and politic by the name of the Ohio & Mississippi Railway Company, and vested with the powers conferred by said Indiana act of March 3, 1865, and with the right to exercise and enjoy, within the State of Ohio, all the privileges, powers, faculties, and franchises, for the purposes of said railroad and its business, which were authorized by said statute of Ohio, by the said 7th section thereof.

Sixth. On the 21st day of November, 1867, at a special meeting of the directors of the Ohio & Mississippi Railway Company of Illinois, and on the 18th day of December, 1867, at a called meeting of the board of directors of the Ohio & Mississippi Railway Company of Indiana and Ohio, the said companies respectively resolved that they did agree to and accept the terms and stipulations contained in a paper, entitled "Articles of consolidation stipulated, agreed upon, and adopted by and between the Ohio & Mississippi Railway Company of Illinois and the Ohio & Mississippi Railway Company of Indiana and Ohio," whereof a copy is hereto annexed and made part as Exhibit B; the said paper being described in the several resolutions of the said companies, of the dates aforesaid, as articles of consolidation between them, made and entered into by virtue and authority of the laws of the States of Illinois, Indiana, and Ohio, authorizing railroad companies to consolidate their property and stock; and, by their said respective resolutions, they did adopt and confirm the said articles
55 so described as such, and did direct that a copy thereof should be attested with the signatures of their respective presidents and their corporate seals, and be filed for record in the offices of the secretaries of state of said States of Illinois, Indiana, and Ohio; and, accordingly, such

writing, entitled articles of consolidation, &c., was signed and sealed on the part of said respective corporations on the 21st day of November, 1867, and on the 18th day of December, 1867, and were filed in the offices of the secretaries of state: for Indiana, on the 28th day of December, 1867; of Ohio, on the 26th day of December, 1867; and of Illinois, on the 28th day of December, 1867; and ever since said day of December the Ohio & Mississippi Railway Company has been a consolidated corporation within the States of Ohio, Indiana, and Illinois, operating lines of railway in those States, and enjoying the franchises and powers granted by the laws thereof, and especially by said laws of said several States authorizing railroad companies to consolidate their property and stock.s

Seventh. Your orators further allege on their information and belief that by an instrument in writing, dated December 15, 1858, known as the trust agreement of creditors and stockholders of the Ohio & Mississippi Railroad Company of Indiana and Ohio, a trust was created whereby Allan Campbell, Joseph W. Alsop, and others were created trustees of such creditors and stockholders, for the purpose of providing
56 for and protecting claims of judgment creditors and other persons holding liens on the property and franchises of said company, and also holders of certain unliquidated demands against it, and also the interests of the stockholders of said company; and that such interests of said creditors and stockholders were assigned to, or otherwise became vested in, said trustees from time to time; so that for a long time before and on the 14th day of September, 1867, said trustees were the owners, subject to the terms of said trust agreement, of the rights, claims, and interests of all the creditors and stockholders of said company in its property and franchises, excepting only, and subject only to, those of the mortgage trustees and bondholders under the mortgage or trust deed made on the 1st mortgage of said railroad and its property and franchises on the 24th day of May, 1853.

In exchange and payment for the interests of creditors and stockholders so transferred to the trustees they had, in virtue of said trust agreement, issued their certificates according to a certain agreed scale and proportion, determined by the priority in point of time, or right, or lien of said interests so transferred to them, in two classes, to wit, preferred and common certificates; the former securing to the holders thereof not only preference in respect to interest on the amounts thereof, but also priority in right in, and security upon, the property held in trust, subject only to such
57 mortgages aforesaid, in virtue of an amendment to said trust agreement, made April 17, 1863, the said trustees being thereto authorized, did also purchase for the benefit of the said trust and the persons interested therein under the agreement of December, 1858, all the stock and a portion of the bonds of the Ohio & Mississippi Railroad Company of Illinois, sometimes called the Western Division.

And further to protect and advance the interests of the persons interested in said trust, to wit, the holders of the trustees' preferred and common certificates, the said trustees made the purchases, on the sales before referred to, of all the property and franchises of the Ohio & Mississippi Railroad Company in Indiana and Ohio, and sometimes called the Eastern Division.

By resolutions duly adopted by the certificate holders on the 10th day

of September, 1867, and set forth in an instrument entitled and known as "Amendments to the trust agreement of December, 1858," and hereto annexed and made part hereof as Exhibit C, it was, among other things, resolved, that the said trustees had made the purchases on the sales in foreclosure aforesaid for the benefit of those interested in said trust agreement of December, 1858; and had also, in virtue of said amendment of April 17, 1863, purchased all the stock and a portion of the bonds of the Ohio & Mississippi Railroad Company of Illinois, and that by such purchases the whole road from Cincinnati to St. Louis had, with all its ap-
58 pendages, become the property of the trust, subject only to the mortgages outstanding. And further, that it was then the intention of all parties interested in the trust to form a new corporation, to which such entire property of the trust might be transferred, in accordance with and execution of the terms of the 15th section of the original agreement.

And it was thereupon further resolved at the same time that, on confirmation of title to the trustees by the courts of Indiana and Ohio, the trustees should form a new corporation, the purposes and obligations of which, as recited in said resolution, should be as follows, to wit: To receive from the trustees all the rights and interests in the railroad and property in Ohio and Indiana, and all the rights, property, and interests in the railroad in Illinois, being the entire capital stock and shares of said latter company, together with all bonds, claims, and demands against said company belonging to the trust; further, that the capital stock of the new corporation should consist of 35,000 shares of preferred and of 200,000 shares of common stock, being in all $23,500,000 of stock which should be issued and distributed as follows, namely: To owners of preferred certificates, registered, should be issued such preferred stock full paid
59 to the amount of such certificates at the rate of one share of such stock for each $100 of such certificates, and that it should be declared upon the face of said preferred stock that it should be and remain a first claim upon the property of the corporation after its indebtedness, and further as set forth in Exhibit C.

The common stock should be issued to holders of common certificates at the same rate.

And it was further resolved that the new corporation should be authorized to create a new mortgage on the entire property of such corporation and covering the entire road from Cincinnati to St. Louis for any amount not exceeding six millions of dollars, four millions whereof should be used solely and exclusively to take up the then outstanding bonds, issued under the mortgages theretofore created on said road.

And it was further resolved by said certificate holders that if a branch should be built to Louisville, the new corporation might increase the preferred stock at the rate of $10,000 for each mile in length of said Louisville branch, and the six million mortgage to the amount of $15,000 for each mile of such road.

*Eighth.* Your orators further allege that the general statute of Indiana authorizing the reorganization of railroad companies, being the statute of March 3, 1865, referred to in the fifth paragraph hereof, provided by the fifth section thereof, that such new corporations as it authorized should have power to issue capital stock to such aggregate amount as might be deemed necessary, not exceeding the amount named in the certifi-

60 cate of organization; and might make preferred stock, make and establish preference in respect to dividends in favor of one or more classes of stock over or above other classes, and might secure such preferred stock and dividends in such order and manner and to such extent as such corporations might deem expedient.

And on the reorganization of said Ohio & Mississippi Railway Company under said act, as set forth in the fifth paragraph hereof, it was provided by the certificate of incorporation, which was framed under and in conformity with the requirements of said act of March 3, 1865, and filed in the offices of the secretaries of state of Indiana and Ohio on the 14th and 26th days respectively of November, 1867, that the original capital stock of such corporation should consist of 35,000 shares of preferred stock, and of 200,000 shares of common stock: Provided, however, that whenever the corporation thereby created should deem it important to connect the railroad with the city of Louisville the preferred stock might be increased in amount not exceeding ten thousand dollars for each mile of such connecting line of railroad.

And your orators allege that this certificate of reorganization was made and filed by said Campbell and his then cotrustees, under the agreement of December, 1858, for the purpose and with the design of executing the provisions of said original trust agreement, for the benefit of the persons interested, to wit, the then holders of the trustees' preferred and common certificates; and in execution especially of the resolutions of the

61 certificate holders aforesaid, adopted on the 14th September, 1867, in amendment of the original agreement, and for the purpose of carrying the same into effect, and of providing for the then holders of preferred certificates the security upon the property of the new corporation which was authorized by said reorganization act of Indiana of March 3, 1865, and, in view thereof, stipulated in those provisions of said amendments of September, 1867, which relate to the proposed preferred stock, and the form of the certificate therefor, and the clause thereof providing that such stock should be and remain a first claim upon the property of the new corporation after its indebtedness.

Ninth. Your orators further aver that at the time of such reorganization under the law of Indiana, all interests in the whole railroad and property of both Eastern and Western divisions, except those of holders of their mortgage securities were controlled by said trustees, and that such reorganization was made by said trustees with a view to the consolidation of the Indiana and Ohio company with that of Illinois, created by the act of February 5, 1861, and that such consolidation was designed by said trustees to be simultaneous with such reorganization in Indiana and Ohio, and that said trustees controlling both companies, designed that the consolidated company should assume and execute the scheme of the reorganized company of Indiana and Ohio, and especially the plan in respect to stock provided by the certificate of reorganization aforesaid. And accordingly, by the articles of consolidation referred to in the sixth para-

62 graph hereof, it was therefore provided that the consolidated corporation should assume all the debts, liabilities, and obligations of the several companies, that the capital stock of the consolidated company should consist of 35,000 shares of preferred, and of 200,000 shares of common stock, and that it might create a mortgage of six million dollars, four mil-

lion dollars of which should be appropriated to take up the then existing mortgage-bond on the said property.

And in execution of these articles, the said consolidated corporation, by its name of the Ohio & Mississippi Railway Company, did issue said preferred stock therein provided for to the amount of 35,000 shares, upon certificates in the form set forth in the paper hereto annexed and made part hereof and marked Exhibit D; these preferred shares were created for the purpose of taking up the trustees' preferred certificates, as above set forth, and were issued in exchange for such preferred certificates in pursuance of the scheme in respect to preferred stock and the security thereof set forth in said resolutions of September 14, 1867, and as more fully set forth in the eighth paragraph hereof, and in execution of the obligation and undertaking of the said reorganized corporation of Indiana to the same effect.

Tenth. Your orators further allege that the certificate holders, by their resolutions aforesaid, of September 14, 1867, being amendments to the trust agreement of December, 1858, intended and so declared that
63 the preferred stock to be created and issued by the corporation afterwards created by said trustees in their behalf, and the obligation of which resolutions, in this as in all respects, were assumed by the consolidated corporation, should give to the persons entitled to receive the same, in accordance with and in virtue of the provisions of the 5th section of the act of Indiana of March 3, 1865, above set forth, not only a preference in respect to dividends over the common stock, but also the preference of a specific and continuing lien and security upon the property of the new corporation, next after the then existing mortgage indebtedness; and it was in accordance with and in execution of this intention that the said certificate holders further resolved that it should be declared upon the face of the certificates of such preferred stock that it should be and remain a first claim upon the property of the corporation after its indebtedness; and it was in accordance with and in execution of the same design that the said reorganized company in its certificates and the consolidating companies by their said articles of consolidation, adopted identical provisions as to the preferred stock, and as to the mortgage indebtedness which should be assumed by the respective companies; and that said consolidated company embodied the same provision aforesaid as to security of the preferred stock upon the property of the company in its certificate as set forth in Exhibit D.

64 And the indebtedness referred to in said resolutions, and also in the said preferred stock certificates, was such indebtedness only as should arise under the mortgage to the amount of six millions of dollars, or any part thereof, contemplated and authorized by the same amendments of September 14, 1867, and contemporaneously with the resolution therein set forth in regard to preferred stock, which provision in regard to such mortgage was also embodied, along with the provision in respect to preferred stock, in the certificate of reorganization under the Indiana law of March 3, 1865, and also in the articles of consolidation of December, 1867. This authorized amount of six millions being designed to represent, and it was in fact the substantial equivalent of, and was authorized for the purpose of taking up and cancelling the indebtedness existing at the time of the consolidation upon the property of the two consolidating companies.

This provision in respect to preferred stock was embodied in the certificate upon which the reorganized corporation of Indiana was incorporated, and in accordance with, and finally to execute, the same design, and in assumption of obligations upon it to that effect; and said consolidated company, under both the first and last articles of the article of consolidation, adopted and became bound to perform the provisions of the amendments to the trust agreement of September, 1867, as to preferred stock,
65 and the securing the same upon the property of the consolidated company to the full intent thereof, as above set forth.

Eleventh. Your orators further allege that the preferred stock to the amount of three and one-half millions, in execution of the provisions of the reorganizing certificates of the Indiana corporation aforesaid, and of the articles of consolidation of the said consolidated railway company, was issued in or about the year 1867, and that subsequently, and on the building of the Louisville branch of said railway, further preferred stock to the amount of about $800,000 was issued, and all upon certificates in the form set forth in Exhibit D; and that all such preferred stock has been ever since outstanding. And your orators have severally been owners of such shares of preferred stock and holders of the certificates therefor, all of which are *in the* forth in Exhibit D, for many years.

Twelfth. And your orators aver that, in virtue of their ownership of said preferred stock, they, in common with the other preferred stockholders, severally had a lien and security and first claim upon all the property and franchises of said consolidated railway company, which existed at the time of the original issue of such preferred stock, in or about the year 1867, next after and subject only to the indebtedness under the six-million mortgage, as authorized by said articles, as representing and designed to cover and cancel the only indebtedness on either of the consoli-
66 dating roads, which was outstanding at the time of such consolidation, being such first-mortgage indebtedness as was created by the mortgage or trust deeds of Dec'r 24, 1867, and June 23, 1869, respectively; and further, that your orators, in common with all the rest of such preferred stockholders, are, and always have been, since their holding of such preferred stock, entitled to the payment of interest, as stipulated in the certificate, out of such net earnings of the company as may remain after payment of interest on first-mortgage bonds issued in virtue of the said mortgage or trust deeds of said company, dated Dec. 24, 1867, and June 23, 1869; and next after payment of such interest on such first-mortgage bonds, and in priority and preference to the payment of any interest or indebtedness under or in connection with any mortgage made by said company since the said first mortgage embraced in said trust deeds of Dec. 24, 1867, and June 23, 1869.

Thirteenth. On the 24th day of December, 1867, the Ohio & Mississippi Railway Company made and delivered to Allan Campbell and J. N. F. Odell its mortgage or trust deed, whereby it conveyed all its railway extending from Cincinnati to East St. Louis, on the Mississippi River, being about 340 miles or thereabouts in length, together with all its franchises and other property in said instrument more particularly described, in trust to secure the holders of said company's bonds to
67 be issued thereunder to the amount of six millions of dollars, and in case of the issue of further bonds to an amount not exceeding

$900,000 *dollars*, on construction of a branch road to Louisville, and on conveyance to the same trustees of all said branch railroad and the property and franchises thereof, then in trust for the holders of such further bonds, the whole security of said main and branch railroads, with the property and franchises, to be held by said trustees for the benefit in common of the holders of both classes of bonds, and under said trust deed of December 24, 1867, or in execution of the power therein reserved in respect to such Louisville branch, and under a mortgage on said Louisville branch railroad, dated June 23, 1869, there were issued, as your orators are informed and believe, bonds to the amount of about six millions eight hundred thousand dollars.

On or about the 25th day of March, 1871, the said Ohio & Mississippi Railway Company made and delivered to the same persons aforesaid its so-called second mortgage or trust deed, whereby, after reciting the lien and priority of said $6,800,000 of first-mortgage bonds, the said company conveyed to said persons all and singular its railways and other property described in said original trust deed of December 24, 1867, in trust however to secure its bonds to the amount, in all, of $4,000,000, which might be issued thereunder, the property by this deed mortgaged being
68 stated to be subject to said prior lien existing under said first-mortgage deed of December 24, 1867. And under said second mortgage all said $4,000,000 of bonds were issued.

And default having been made in payment of interest on bonds issued under both said first and second mortgages, the said Campbell, as surviving trustee, on or about , 1877, brought his suit in the circuit court of the United States for the district of Indiana, which is now there pending, alleging such default, praying for a sale of all the property and franchises conveyed by the original and Louisville branch mortgages to said trustees, and payment out of the proceeds thereof of the amount due on outstanding bonds of said first mortgage and application of any surplus thereafter remaining to payment of the amount due on bonds issued under said second mortgage.

Fifteenth. And your orators are advised by their counsel and believe, and therefore aver, further that the pretended purchase of the Springfield Railroad by the Ohio & Mississippi Railway Company was not within the lawful powers of the latter company, and that all acts purporting to have been done by it in consummating such pretended purchase, and the execution of the mortgage of January 30th, 1875, on the property so pretended to be purchased and the issuing of all or any of said railway company's bonds thereunder are all illegal and void, and that neither such
69 mortgage nor bonds are valid obligations of the said company.

Sixteenth. Your orators further allege that they have held their respective shares of the preferred stock of said company which are above named, for many years; that they bought said shares as permanent investments, believing and relying on the belief and, as they aver, the truth is, that the said shares as imported on the face of the certificates, and in virtue of the provisions of the original and amended agreements of 1858 and 1867, and of said reorganizing statute of Indiana of March 3d, 1865, and the laws of Ohio and Illinois relating to the consolidating companies, and the action of the said reorganized and of the consolidated company, were and so would always remain, secured by, and a specific and first lien,

charge, and claim upon all the property and franchises of said consolidated company, next after, and subject only to the indebtedness created by or under said first mortgage made by said company on or about Dec. 24, 1867; or to an indebtedness not exceeding in all $6,800,000.

And your orators allege on their information and belief that the existence of the preferred stock and of the certificates therefor as set forth in Exhibit D, and that such stock was and would always remain secured by and a specific and first lien, charge and claim upon all the property and
70 franchises of said railway company next after and subject only to the indebtedness and lien created by said first mortgage, were all well known to the respective trustees under said second mortgage deed of March 25, 1871, and under said mortgage of the Springfield division property of January 30, 1875, long before the delivery of said mortgage deeds to said trustees; and also to the holders of bonds issued under each of said mortgages before they became holders thereof; and that the same things were known to all other persons claiming any lien or charge upon the property and franchises of said company, subsequent to said first mortgage, and long before the dates of their alleged liens or incumbrances.

Seventeenth. Your orators further allege, on their information and belief, that the holders of second mortgage bonds of said Ohio & Mississippi Railway Company claim that they are entitled to be paid interest on their bonds, next after interest is paid in full to the holders of the company's first-mortgage bonds.

And that the holders of bonds issued under the Springfield division mortgage of January 30, 1875, claim that that mortgage is a security for their benefit upon the Springfield division of the road, and that they are entitled to be paid interest by the Ohio & Mississippi Railway Com-
71 pany on such bonds next after interest in full is paid on the first and second mortgage bonds, successively, of said company, and that said company is bound to pay the principal of all bonds issued under said mortgage.

Eighteenth. Your orators further aver that default has been made in payment of all interest on said Springfield division bonds since Nov. 1, 1877, and they fear that proceedings may be taken therefor to foreclose said mortgage, and that on failure to secure, on a sale of the property covered by the pretended trust or mortgage of January 30, 1875, an amount sufficient to discharge the claims of the holders of the bonds issued thereunder, as your petitioners, under their information and belief, aver will be the case, on account of the great inferiority in the value of the property to the amount of the mortgage bonds issued thereon, that demand will be made upon and judgment had against the Ohio & Mississippi Railway Company for payment of such deficiency, and that said company will pay the same, to the wrong and damage of your orators and all other preferred stockholders, and also of all the common stockholders of said company.

Nineteenth. The action now pending in the United States circuit court for the district of Indiana, and numbered 4785, is an action consolidating the suit of Campbell, trustee, against the Ohio & Mississippi
72 Railway Company, referred to in the twelfth paragraph of this petition, with an action brought by William King and others against the same company, and another referred to in the fourteenth paragraph

hereof, wherein it is alleged that the complainants, or some of them, are owners either of Springfield division or of second mortgage bonds of said defendant company, and alleging its total insolvency, and asking the appointment of a receiver, which relief was granted in said action, and such receiver appointed by this court, and his successors have ever since been in possession of and administering the whole property of said Ohio & Mississippi Railway Company.

In said suit of William King and others against said railway company, Allan Campbell and another, the said Campbell on or about January , 1878, filed his cross-bill against the said William King and the other complainants in his suit, and also against the Farmers' Loan and Trust Company and the National Trust Company, wherein he alleged the execution and delivery to him and his co-trustee, Odell, of the trust deeds of first mortgage of the respective dates of December 24, 1867, and June 23, 1869, and of said second mortgage trust deed of March 25, 1871,
73 and defaults theretofore made in conditions of all of said mortgages, and the filing of the original bill by King in the suit above-named; and, as your orators allege is true, that on or about the day of , and on the 28th day of September, 1877, the said King and others had filed their two supplemental bills in the same cause, and by said original and supplemental bills prayed for foreclosure and sale of all the property of the railway company under said second and Springfield division mortgages.

And the said Campbell by his cross-bill prayed for removal of the receiver appointed in said suit of King, and surrender of all its property to said Campbell as trustee, and foreclosure and sale of all the property of said company described in said second mortgage and application of the proceeds successively of indebtedness on bonds issued under said first and second mortgages respectively.

And in neither of said actions, so consolidated, nor in said supplemental or cross-bills therein, are the rights of your orators as herein alleged, recognized, but, on the contrary, they are ignored and in substance denied, and the bills in both said actions and said supplemental bills and cross-bills assume, and in substance allege, but contrary to the truth, that your petitioner and all other preferred stockholders have no lien or security whatever upon the property or franchises of the corporation, and no
74 right therein except subsequent and subject to the interests of the trustees in said several mortgages, and of the holders of any bonds issued thereunder; and the prayers thereof ask such relief as will, if granted, unlawfully, inequitably, and unjustly postpone the interests of your orators, and of the whole body of preferred stockholders, to interests which are in fact junior to theirs, and will wholly obliterate and destroy their interests and cause them great and irreparable damage.

And the said successive receivers of the property of said company, appointed from time to time by this court, and ever since the creation of such receivership, have likewise refused to recognize the rights of your orators and their fellow preferred stockholders, as herein set forth, and have refused to pay them the interest to which they have been entitled according to the terms of their certificates, to wit, seven per cent., out of the net earnings remaining after payment of interest on the bonds outstanding from time to time under said consolidated first mortgage; but have, to the

wrong and damage of your orators and their fellow preferred stockholders, applied surplus net earnings so remaining, to which the preferred stockholders were entitled, to payment of interest on bonds of said second mortgage and to other unauthorized uses; and especially have wrongfully applied such surplus net earnings aforesaid to payment of five semi-annual coupons on bonds issued under said second mortgage to the amount altogether of , instead of applying such fund, as they were bound to do on account of the prior right or the preferred stock, to payment of interest due your orators and their fellow holders of such stock.

75 Twentieth. Your orators apprehend in case of foreclosures on either of the mortgages hereinbefore referred to, or on any other disposition made by the court in either of the suits covered by said consolidated action, without the presence of the preferred stockholders, by representation of your orators or others, as parties to said suit, or otherwise standing in court, that their rights as preferred stockholders may be seriously prejudiced or forever lost; and they allege that upon the grounds herein set forth, and as they are persons having a clear priority of right in and security upon the property and franchises of said railway company, over all parties claiming any right in or security upon such property and franchises, except the trustees and bondholders under said first consolidated mortgage, that they are proper and necessary parties to said consolidated action.

Wherefore, your orators pray that this court do adjudge and decree in this action that your orators and all other preferred stockholders of said railway company who may come in and claim the benefit of this proceeding and contribute to the expense thereof, are entitled as such preferred stockholders to, and have always had, a specific and continuing lien and security and first claim upon and in all the property and franchises of said railway company next after, and subject only to, the interest and security therein, which is given by or under authority of the first mortgage or trust deed of December 24, 1867, to the trustees thereby created or the holders of bonds issued thereunder.

76 That the court do further adjudge and decree that your orators, and such other of their fellow preferred stockholders as may come in and claim the benefit of this proceeding as aforesaid, have been since their acquirement of their respective shares, and always will be while holders of said shares, entitled to receive interest at the rate of seven per cent. upon the par value of their respective shares out of any net earnings of the company which have remained or shall remain after payment of interest to holders of bonds issued under such first consolidated mortgage, according to the terms thereof; and that the receiver, administering the affairs of said company under the direction of this court, or his successor in the trust, do pay to your orators, and such others of the preferred stockholders as may come in as aforesaid, such interest upon their shares as they were entitled to, according to the prayer hereof, out of the net earnings of the company which remained heretofore in any year when such interest was not paid to them, after payment of interest on the bonds issued under said first consolidated mortgage.

That the court do adjudge and decree that the deed purporting to convey the Springfield division property to the Ohio & Mississippi Railway Company, and its trust deed purporting to create a mortgage of the same property, and its bonds issued in connection therewith, are all void.

That the court do further, in any decree of foreclosure of either of the mortgages described in the actions herein consolidated, declare, ad-
77 judge, and decree the rights of your orators, and other preferred stockholders according to the allegations and prayers of this petition; and that they may be protected and provided for accordingly, as having such lien and security upon the franchises and property of the railway company, next after that secured to trustees and bondholders by or under the trust deed of December 24, 1867, as is above set forth; and so that, in case of foreclosure of said first mortgage as prayed by the bill of Campbell, trustee herein, all surplus, after satisfaction of claims under said first mortgage, be applied first to payment in full, or pro rata, as the case may be, of the par value of their preferred shares to your orators and such of their fellow preferred stockholders as may become entitled to such payment, and so that, in case of foreclosure of either said second or Springfield division mortgages, the decree therein shall provide that any sale in either of such cases shall be subject, not only to the amount due under said first consolidated mortgage, but also and next in order to the amount at par of the preferred stock of your orators and of that of all other preferred shareholders who may come in and claim the benefit of this proceeding as aforesaid, with all unpaid interest due thereon at seven per cent. to the date of the decree.

And your orators pray that they may have such other or further relief, order, and decree in the premises as may be just.

GEO. HENRY WARREN.
78 EDWARD H. GREEN.
T. CHICHESTER.
N. B. WARREN.
S. WHITNEY PHŒNIX.
P. TOWNSEND.
G. HARRY WARREN.
JAMES RENWICK.

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

George Henry Warren, Edward H. Green, Theodore Chichester, Nathan B. Warren, S. Whitney Phœnix, Peter Townsend, G. Harry Warren, and James Renwick, being severally duly sworn, depose and say, each for himself, that he is one of the complainants above named; that he has read the foregoing bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and that as to those matters he believes it to be true.

Sworn to before me the 20th day of November, 1879, by the said George Henry Warren, Edward H. Green, Theodore Chichester, Nathan B. Warren, S. Whitney Phœnix, Peter Townsend, and G. Harry Warren, and on the 21st day of November, 1879, by the said James Renwick.

[SEAL.] JOSEPH A. WELCH,
*U. S. Commissioner Southern Dist. of New York.*

79 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John I. Davenport, clerk of the circuit court of the United States

of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of Joseph A. Welch whose name is subscribed to the annexed verification, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

80 EXHIBIT A.

*Certificate of incorporation of the Ohio and Mississippi Railway Co.—Filed in the office of the secretary of state of the State of Ohio, on the 26th day of November,* 1867; *in the office of the secretary of state of Indiana, on the* 14*th day of November,* 1867.

Whereas in certain judicial proceedings in the circuit courts of the United States for the State of Indiana, and the southern district of Ohio, being suits in equity for the foreclosure of mortgage in which E. D. Morgan and others were plaintiffs, and the Ohio & Mississippi Railroad Company were defendants; the Ohio & Mississippi Railroad, running from Cincinnati, in the State of Ohio, to the western boundary of the State of Indiana, in the city of Vincennes, at a sale thereof, under and by virtue and authority of decrees of said courts in said foreclosure suits, and by virtue of, and pursuant to, the authority and powers in the mortgage or deed of trust in foreclosure, of which said decrees were made, was purchased by Allan Campbell, Joseph W. Alsop, Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock, and William A. Booth, as trustees of an express trust created and controlled by an agreement of certain stockholders and creditors of said railroad company, dated December 15, 1858, and of certain additions thereto and amendments thereof, whereby the said purchased property became the property of said

81 trust, and was held by said persons as trustees;

And whereas afterwards, the said Samuel W. Comstock and Edward Bartlett departed this life, and the said Edward Learned, William A. Booth and David Leavitt resigned their trust, in accordance with the terms of said agreement, and William H. Aspinwall, William Whitewright, jr., Samuel U. F. Odell, and William D. Griswold were duly appointed trustees in the place and stead of said Comstock, Leaned, Booth, and Leavitt, and accepted the trust;

And whereas afterwards, to wit, at the October term of the United States circuit court for the southern district of Ohio, and again at the November term of the United States circuit court for the State and district of Indiana, by the finding of said courts the said facts, and other facts, were established; and it was thereupon ordered that the deed theretofore ordered to be executed by Edward D. Mansfield and George Hoadley, who made the sale of said property to said purchasers, instead of being executed

and delivered to them, should be executed and delivered to the undersigned, the said last-named and substituted trustees, together with said Allan Campbell and Joseph W. Alsop, which was accordingly done—all of which will fully appear by reference to the records and proceedings of said courts;

And whereas we are desirous to form a corporation for the legal ownership of said road, and for the control and government thereof:

82 Now, therefore, in conformity to the provisions of an act of the legislature of the State of Indiana, entitled "An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations, and to exercise corporate powers, and to define their rights, powers, and privileges, to enable such corporations to purchase and construct connecting and branch roads and to operate and maintain the same," approved March 3d, 1865, and with the view and purpose to adopt and make available so much of the powers and privileges granted and contained in the seventh section of the act of the general assembly of the State of Ohio, entitled "An act to regulate the sale of railroads and the reorganization of the same," passed April 11th, 1861, as are applicable to a corporation of the State of Indiana possessing a railroad partly in Indiana and partly in Ohio:

We, the undersigned, purchasers as aforesaid of the Ohio & Mississippi Railroad, do hereby certify—

First. That the name of the corporation organized pursuant to the aforesaid act shall be the "Ohio & Mississippi Railway Company."

Second. That the number of directors of the said corporation shall be thirteen, until such number shall be altered in conformity to law.

Third. That the names of the first directors are Joseph W. Alsop, William H. Aspinwall, William Whitewright, jr., Samuel U. F. Odell,

83 Allan Campbell, Frederick Schuchardt, William D. Griswold, John Ross, Lorz Anderson, W. W. Scarborough, Alexander H. Lewis, Lewis B. Parsons, Samuel Gaty.

Fourth. That the period of service of such first directors shall be and continue until the second Thursday of October, one thousand eight hundred and sixty-eight.

Fifth. That the original capital stock of such corporation shall consist of thirty-five thousand shares, of one hundred dollars each, of preferred stock, and of two hundred thousand shares, of one hundred dollars each, of common stock; and the amount of said capital stock in the aggregate of both classes shall be twenty-three million five hundred thousand dollars: Provided, That whenever the corporation hereby created may deem it important to connect their railroad with the city of Louisville the preferred stock may be increased in amount not exceeding ten thousand dollars per mile for each mile of such connecting line of railroad.

Dated this 4th day of November, A. D. 1867.

[Five-cent revenue stamp.]

ALLAN CAMPBELL,
JOS. W. ALSOP,
WM. H. ASPINWALL,
W. WHITEWRIGHT,
S. U. F. ODELL,
WM. D. GRISWOLD,
*Trustees.*

84 EXHIBIT B.

Articles of consolidation stipulated, agreed upon, and adopted by and between the Ohio and Mississippi Railway Company of Illinois and the Ohio and Mississippi Railway Company of Indiana and Ohio, are as follows, viz:

That these companies hereby agree to consolidate all their stock and property.

That the consolidated corporation shall assume all the debts, liabilities, and obligations of the several companies.

That the corporate name of the consolidated company shall be "Ohio and Mississippi Railway Company."

That the corporate seal thereof shall be the same which has been adopted as the corporate seal of the Ohio and Mississippi Railway Company of Indiana and Ohio.

That the consolidated company shall be governed by a board of directors who shall have all the powers, rights, and privileges enjoyed by the boards of directors of the several companies.

That such board of directors shall be in the names, persons, and numbers of the members composing them, the same as compose the board of directors of the said Ohio and Mississippi Railway Company of Indiana and Ohio, and shall hold their office for the same time and under the same regulations as pertain to the said last-named board of directors.

85 That the organization for conducting the business of the consolidated company, and the rules and regulations and by-laws controlling it, shall be the same as adopted and used by said Ohio and Mississippi Railway Company of Indiana and Ohio.

That the officers and committee elected or chosen by the board of directors of said last-named company shall be the corresponding officers and committee of the consolidated company, with all the rights and powers which were or might be lawfully enjoyed or exercised by them.

That the capital stock of the consolidated company shall consist of thirty-five thousand shares of preferred stock and two hundred thousand shares of common stock of the par value of one hundred dollars each, making a total capital stock of twenty-three millions five hundred thousand dollars.

That the consolidated corporation shall be authorized to create a new mortgage on this road of three hundred and forty miles and their property for six millions of dollars, or any part thereof, in sterling bonds, of which four millions of dollars shall be appropriated and used to take up the present mortgage bonds on said property.

And that the said consolidated company shall have all such further powers and rights as are conferred and contemplated in certain amendments adopted by the certificate holders at a meeting held by them on the 14th day of September, A. D. 1867, of an agreement dated December 15th, A. D. 1858, of the creditors and stockholders of the Ohio and

86 Mississippi Railroad Company of Indiana and Ohio, said agreement representing a trust which at the date of said amendments embodied the entire ownership of the property of both said companies so consolidated.

Witness the corporate seal of said first-named company and the signature of their president, November 21, 1867.

[L. S.] WM. D. GRISWOLD,
*President.*

Attest: G. K. McGUNNEGLE,
*Sec'y O. & M. R. W. Co.*

Witness the corporate seal of said company secondly named and the signature of their president, December 18, 1867.

[L. S.] WM. D. GRISWOLD,
*President.*

Attest: SAM'L TREVOR,
*Ass't Secretary.*

EXHIBIT C.—ADOPTED.

Amendments submitted to the certificate holders September 10th, 1867, and unanimously recommended by the trustees, to enable them to make an early transfer of the property to a new corporation.

Whereas the trustees of creditors and stockholders of the Ohio
87 and Mississippi Railroad Company (eastern division) named in the agreement of December 15th, 1858, and their successors duly appointed, have purchased at a sale under foreclosure for the benefit of those interested in said agreement, the Ohio and Mississippi Railroad (eastern division), running from Cincinnati, in the State of Ohio, to Vincennes, at the western boundary line of the State of Indiana; and

Whereas said trustees in virtue of powers conferred on them by an amendment to said agreement, adopted April 17th, 1863, had previously purchased all the stock and a portion of the bonds of the Ohio and Mississippi Railway, of Illinois, formerly known as the Ohio and Mississippi Railroad (western division), which extends from Vincennes, at the western boundary of Indiana, to the Mississippi River, opposite St. Louis; and

Whereas by said purchases the whole line of railroad between Cincinnati and St. Louis, now known and operated as the Ohio and Mississippi Railroad line, has, with all its appendages, become the property of the trust, subject only to the mortgage bonds outstanding; and

Whereas it is the intention of all parties interested in the trust to form a corporation to which the entire property of the trust may be transferred in pursuance of the fifteenth article of said agreement; and

Whereas certain amendments to said fifteenth article were passed by certificate holders at a special meeting convened on the first day of November, 1866, and adjourned on the 28th day of March, 1867, authorizing
88 the formation of such corporation, and the creation of a large amount of assessible scrip stock to be used for the purpose of building new roads and branches; and

Whereas it has been recommended by parties largely interested in this trust, and advised by counsel to alter the plan of reorganization contemplated by said amendments of March 28th, 1867, and to leave more discretion to the new corporation to which the property of the trust is to be transferred:

It is hereby resolved and agreed that the whole of said amendments

passed at said special meetings shall be and are rescinded and annulled and that in lieu thereof the following amendments shall be made to said trust agreement, under the authority conferred by the eleventh article as amended March 6th, 1862, which, when agreed to, as provided in said amended article, shall be held and deemed to be a part of said agreement as amendatory of said fifteenth article.

After the title to the Ohio & Mississippi Railroad (eastern division) is obtained in accordance with the orders of the United States court for the districts of Ohio and Indiana, the trustees shall form a new corporation, under such laws of the States of Ohio, Indiana, and Illinois, or either of them, as they shall deem advisable.

The purposes and obligations of such a corporation shall be and be made as follows:

To receive from the trustees the property to be purchased as aforesaid, viz, the Ohio & Mississippi Railroad (eastern division) and also
89 all rights, properties, and interests held by them in or relating to the Ohio & Mississippi Railway Company (the western division), being the entire capital stock and shares of said company, together with all bonds, claims, or demands against said company, held or belonging to the trust.

To receive from the trustees any and all properties or things belonging to the trust, and properly deliverable on the final termination thereof.

The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock twenty-three millions five hundred thousand dollars, which shall be issued and distributed as follows:

To the persons or parties who shall be duly registered on the books of the trust as the owners of trustees' certificates, upon a day to be determined by the trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the city of New York, upon the surrender by the said owners and the cancellation of their several certificates, and on the terms following, namely:

To the owners of preferred certificates so registered, or to their legal representatives, there shall be issued preferred stock of the corporation, full paid, for the amount of such preferred certificates, at the rate
90 of one share of such preferred stock for every one hundred dollars of preferred certificates and scrip for fractional parts of such share. Interest in cash at the rate of seven per cent. per annum, to be paid upon preferred certificates from January 1st, 1867, to the day designated by the trustees for conversion into stock, but such interest is not to be paid until said certificates are surrendered for conversion.

It shall be declared upon the face of said preferred stock that it is to be and remain a first claim upon the property of the corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum upon the amount of said stock, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock of said corporation; and that whenever the net earnings of the corporation, which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient

to pay both said interest of seven per cent. on the preferred stock in full and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share.

To the owners of common certificates, registered as aforesaid, or to
91 their legal representatives, there shall be issued full-paid common stock at the rate of one share for every one hundred dollars of common certificates surrendered, and scrip for fractional parts of such share.

The scrip issued for fractional parts of shares of preferred and common stock shall be made convertible into shares of full-paid preferred or common stock respectively, when presented and surrendered for cancellation in sums not less than one hundred dollars, duly endorsed by the persons or parties to whom said scrip was issued, without the necessity of transfer on the books of the corporation; but said scrip shall not be entitled to interest or dividend until converted into full shares.

It shall be made obligatory upon the new corporation to purchase and cancel such amount of common certificates as may be in excess of twenty million of dollars, such excess now being $226,604.44.

The trustees are hereby authorized to sell and dispose of, for the benefit of the trust, such amount of preferred certificates as is yet unissued within the aggregate sum of three million five hundred thousand dollars, such amount now being $146,816.18.

The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dol-
92 lars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees, to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on said property at or before the maturity thereof.

Whenever the new corporation may deem it important to the interest to connect their road with Louisville, they are hereby authorized to increase the amount of preferred stock ten thousand dollars per mile for each mile of such connecting line; and are also authorized to provide in the mortgage for six million of dollars above contemplated, that the same may be increased by fifteen thousand dollars per mile for each mile of such connecting line to Louisville to be used for perfecting such connection.

Holders of the outstanding bonds of the Ohio and Mississippi Railroad Company, both eastern and western divisions, and holders of bonds to be issued by the new corporation to be entitled to one vote for each one hundred dollars of bonds so held, at all stockholders' meetings and on all affairs of the corporation.

The trustees shall transfer and convey to the new corporation the entire property belonging to the trust held or controlled by them, in such manner and by such instruments in writing, as counsel may advise; and
93 they are authorized to do any and all acts and things necessary to carry into effect the purposes and declarations of this amendment to the trust agreement, and to discharge any expenses or obligations made or incurred on account of this and all previous meetings or certificate holders

which they shall deem properly claimable from the beneficiaries of the trust.

The new corporation shall assume all the obligations and liabilities of the trustees under or connected with the trust agreement, and their actions relating thereto, and shall protect and save said trustees from all loss or harm on account thereof; and shall undertake the execution and obligations of this amendment in such form and manner as shall be satisfactory to said trustees.

On the due transfer of the property as aforesaid to the new corporation, and upon proper measures being taken to secure to the certificate holders their respective shares of stock as aforesaid, and upon the assumption of the liabilities and obligations as aforesaid, this trust shall be, and be taken to be, discharged and terminated; and the trustees shall thereupon be fully released forever from any claims, loss, or damage therefrom, or in any manner relating thereto, by reason of any act or omission by them or either of them pertaining thereto.

The original agreement having made no provision for compensa-
94 tion to the trustees for their services, and it being desired that all questions relating to the trust shall be hereby settled, it is agreed that the following amendment shall be made to said agreement:

There shall be issued to the trustees, in full compensation for their services and amounts due for their personal expenses in the execution of the trust an amount of preferred certificates equal to one-half of one per cent. upon the aggregate amount of certificates issued under the trust agreement, to be apportioned by the trustees according to their respective terms of service.

## Exhibit D.

### Ohio and Mississippi Railway Company.

Reorganized and consolidated 1867.

*Preferred stock.*

This is to certify that is entitled to shares of the preferred capital stock of the Ohio and Mississippi Railway Company, of one hundred dollars each, transferable only on the books of said company, in the city of New York, in person or by attorney, on the surrender of this certificate.

The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such in-
95 terest paid in full for each and every year before any payment of dividend upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share.

This certificate is not valid until countersigned by the register of transfers.

New York, , 187 .

*Secretary.*
*President.*

Countersigned this day of , 187 .

UNION TRUST CO. OF N. Y.,
JAS. OGILVIE, *Register.*

And the said answer of the said George Henry Warren and others to the bill of complaint, &c., of William King and others against the Ohio and Mississippi Railway Company and others, is in the words following, to wit:

96 The answer of George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green, to the bill of complaint, and amended and supplemental bill, and bill of supplemental amendment of William King, John W. Garrett, Robert W. Garrett, T. Harrison Garrett, and James G. Ross, against the Ohio and Mississippi Railway Company, Allen Campbell, The Farmers' Loan and Trust Company of the City of New York, and George H. Warren and others, defendants, being the bills filed in the cause herein consolidated, and which was originally numbered 4785, and to which these defendants were made parties by order of the court, dated , 1879.

These defendants admit the allegations of the bill of complaint that the said railway company did, on December 24, 1867, and does now, own a certain main line of railway, and the branch line to Jeffersonville, described in the bill, but whether or not it has validly acquired title to and now owns the branch called "the Springfield division" these defendants are not informed except as hereinafter stated, and leave the complainants to make such proof in that behalf as they may be advised is material.

The defendants further admit the making of the first mortgage of December 24, 1867, and of the mortgage on the Louisville branch, on
97 June 23, 1869, for the amounts, and to the trustees, and otherwise as it is alleged in the bill, and that the trustee Odell is dead, and that his place has not yet been filled; but the defendants are unable to state, and therefore do not admit, that the number of bonds outstanding under said mortgages are to the very amounts alleged in the bill, and leave the complainants to make such proof thereof as they may be advised is material.

The defendants further admit the execution, on or about March 25, 1871, of the so-called second mortgage, and that it was of the tenor and to the effect set forth in the bill, and that it was made to secure the amount of bonds to the amount of $4,000,000; and also, that by said second mortgage provision was made for a sinking fund with such conditions as to the payment of instalments thereof as are set forth in the bill; but what amounts of said second mortgage bonds have been issued or sold, or purchased, or cancelled, or what amounts thereof are in the hands of holders thereof, or otherwise now outstanding, these defendants are not informed sufficiently to form a belief, and leave the complainants to make such proof of their allegations in that respect as they may be advised is material.

The defendants deny that said second mortgage is a security for such outstanding bonds upon the premises mortgaged thereby, junior only to the prior liens thereinbefore described in the bill, to wit, two amounts, one of $276,000, and one of $6,657,000, but allege to the contrary that
98 said second mortgage is a security for the bonds outstanding under it, junior not only to the prior liens above referred to and to the amounts thereof named in the bill, but also to the lien of the amount of the preferred stock of the said railway company to the amount of about $4,300,000.

The defendants further admit that on the 30th day of January, 1875, by a deed of mortgage of that date, the defendant executed, acknowledged, and recorded a mortgage to The Farmers' Loan and Trust Company of the so-called Springfield division, more fully described in the bill, and thereby purported to convey to the said trustee all the property therein described for the purposes therein mentioned, and to secure the amount of bonds therein named; but the defendants allege, upon their information and belief, that the pretended purchase of said Springfield Railway by the Ohio and Mississippi Railway Company was not within its lawful powers, and that all acts purporting to have been done by it in consummating such pretended purchase and in making the mortgage of January 30, 1875, on the property so pretended to be purchased, and the issuing of all or any of said railway company's bonds thereunder were illegal and void, and that neither such bonds nor such mortgage are valid obligations of said company.

The defendants are not informed, and therefore cannot admit
99 that the complainants are severally the holders of the bonds or unpaid coupons alleged to be held by them, and leave the complainants to make such proof thereof as they may be advised is material.

And as to the other allegations of the bill, defendants are not sufficiently informed as to their truth to form a belief, and leave the complainants to make such proof thereof as they may be advised is material.

PORTER, LOWREY, SOREN & STONE,
*Defend'ts' Solicitors.*

JOHN K. PORTER, *of Counsel.*

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green, being severally duly sworn, say severally that they are defendants in this cause, that they have read the foregoing answer and know the contents thereof, and that the same is true to the best of their knowledge and belief, except as to those matters which are therein alleged on their information and belief, and that as to those matters they believe it to be true.

GEO. HENRY WARREN.
EDWARD H. GREEN.
100 P. TOWNSEND.
T. CHICHESTER.
N. B. WARREN.
S. WHITNEY PHŒNIX.
G. HARRY WARREN.
JAMES RENWICK.

Sworn to before me the twentieth day of November, 1879, by George Henry Warren, Edward H. Green, Peter Townsend, Nathan B. Warren, S. Whitney Phœnix, Theodore Chichester, and G. Harry Warren, and on the twenty-first day of November, 1879, by James Renwick.

[SEAL.] JOSEPH A. WELCH,
*U.S. Commissioner Southern Dist. of New York.*

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of Joseph A. Welch, whose name is subscribed to the annexed verification, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of these United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

101 And the demurrer of the said defendants to the said cross-bill of George Henry Warren and others in the above-entitled cause is in the words following, to wit:

The joint and several demurrer of John W. Garrett, Robert Garrett, T. Harrison Garrett, James G. Ross, The Ohio & Mississippi Railway Company, and Allan Campbell, trustee, to the cross-bill of George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green.

These defendants by protestation not confessing all or any of the matters and things in said cross-bill contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause demurrer show that said cross-complainants have not, in and by their said cross-bill, made or stated such a case as entitles them or any of them in this honorable court to any relief against these defendants or any of them as to the matters contained in said cross-bill or any of such matters.

Wherefore these defendants doth demur thereto, and pray the judgment of this honorable court whether they or either of them should be compelled to make any further answer to said cross-bill, and pray to be hence dismissed with their costs and charges in this behalf sustained.

HOADLEY, JOHNSON, & COLSTON,
HARRISON, HINES, & MILLER,
102 *Sol's for Jno. W., Robert & T. Harrison Garrett.*
C. A. BEECHER, *Sol. for O. & M. R'y Co.*
BAKER, HORD, & HENDRICKS,
*For Allen Campbell, Trustee.*
BRISTOW, PEET, BURNETT, & OPDYKE,
*(per Holstein) For Jas. G. Ross.*

UNITED STATES OF AMERICA,
*District of Indiana:*

Benjamin Harrison, of lawful age, being sworn according to law, says that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

BENJ. HARRISON.

Subscribed & sworn to before me this 17th day of March, 1880.
NOBLE C. BUTLER, *Clerk.*

Harrison, Hines, & Miller, of counsel, certify that they have perused the said cross-bill of Warren & others in the above cause & that the foregoing demurrer is well founded in point of law.

HARRISON, HINES, & MILLER,
*Of Counsel.*

103 And the said demurrer of The Ohio and Mississippi Railway Company et al. is in the words following, to wit:

The joint and several demurrer of the Ohio and Mississippi Railway Company, William King, James G. Ross, and John W. Garrett, Robert Garrett, and T. Harrison Garrett, partners, as Robert Garrett and Sons, to the cross-bill filed herein as of the 31st day of October, 1879, by George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green.

Come now the said demurring defendants and jointly and severally demur to the said cross-bill, and for cause of demurrer show that the said cross-complainants, George Henry Warren and others, as aforesaid, have not by their said cross-bill made such a case as entitled them, or any of them, in a court of equity to any discovery from these demurring defendants, or relief against them, or any of them.

Wherefore, and for other good causes, they jointly and severally demur to said cross-bill, and pray the judgment of this court whether they shall be compelled to make any further or other answer thereto, and for their costs.

C. A. BEECHER,
*Solicitor for Ohio & Mississippi Railway Co.*

104 HENRY CRAWFORD,
HARRISON, HINES & MILLER,
HOADLEY, JOHNSON & COLSTON,
*Solicitors for Other Demurring Defendants.*

GEO. HOADLEY, *of Counsel.*

In my opinion the foregoing demurrer is well founded in point of law.

GEO. HOADLEY,
*Of Counsel for Demurrants.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

William T. McClintick, being duly sworn, says that he is president of

the Ohio and Mississippi Railway Company, and that the above and foregoing demurrer is not interposed for delay.

WILLIAM T. McCLINTICK.

Sworn to and subscribed before me this twenty-seventh day of November, 1879.

As witness my hand and notarial seal as notary public within and for the county of Ross and State of Ohio, in the southern district of Ohio aforesaid.

THOMAS W. WALSH,
*Notary Public, Ross County, Ohio.*

And the said demurrer of Allan Campbell is in the words following, to wit:

105 The separate demurrer of Allen Campbell, trustee, to the cross-bill filed herein as of the 31st day of October, 1879, by George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green.

Comes now the said demurring party and separately demurs to the said cross-bill, and for cause of demurrer shows that the said cross-complainants George Henry Warren and others as aforesaid have not by their said cross-bill made such a case as entitled them, or any of them, in a court of equity to any discovery from this demurring party or relief against him.

Wherefore, and for other good causes, he separately demurs to said cross-bill, and prays the judgment of this court whether he shall be compelled to make any further or other answer thereto, and for his costs.

BAKER, HORD & HENDRICKS,
*Solicitors for Demurrant.*

In my opinion the foregoing demurrer is well founded in point of law.

BAKER, HORD & HENDRICKS,
*Sol's for Demurrant.*

UNITED STATES OF AMERICA,
*District of Indiana, ss:*

106 , being duly sworn, says that he is one of the solicitors for said respondent, Allen Campbell, who resides in the city of Baltimore, and that the foregoing demurrer is not interposed for delay.

We waive the personal affidavit of Allen Campbell, respondent, to the foregoing demurrer, or any other person.

TAYLOR, RAND & TAYLOR,
*Solicitors for Cross-Complainants Warren et al.*

107 And afterwards, to wit, on the 25th day of February, A. D. 1880, at the November term of said court, before the honorables Thomas Drummond and Walter Q. Gresham, judges of said court, the

following further proceedings in the above-entitled cause were had, to wit:

The demurrer to the cross-bill of George Henry Warren and others, preferred stockholders of the Ohio and Mississippi Railway Company, having been heretofore argued by the counsel of the respective parties and considered by the court, it is ordered that the demurrer to the said cross-bill be sustained.

And afterwards, to wit, on the 30th day of March, A. D. 1880, at the November term of said court, before the honorables Thomas Drummond and Walter Q. Gresham, judges as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The demurrer heretofore filed in this suit by the Ohio and Mississippi R. W. Company, William King, James G. Ross, and John W. Garrett, Robert Garrett, and T. Harrison Garrett, to the cross-bill of George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, Theodore Chichester, James Renwick, Robert B. Minturn, John Minturn, Peter Townsend, and Edward H. Green, having been heretofore argued by the counsel of the respective parties and carefully considered by the court, it is ordered that said demurrer be sustained and that said cross-bill be, and the same is hereby, dismissed with costs, for want of
108 equity, and the cross-plaintiffs pray an appeal to the Supreme Court of the United States, which is granted on their giving bond according to law.

And afterwards, to wit, on the 8th day of May, A. D. 1880, at the November term of said court, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, and Theodore Chichester, by their solicitors, and also come William King, John W. Garrett, Robert Garrett, J. Harrison Garrett, James G. Ross, the Ohio and Mississippi Railway Company, Allan Campbell, and the Farmers' Loan and Trust Company, by their solicitors; and the said George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, and Theodore Chichester, complainants in the cross-bill, filed in the above-entitled suit and tender their appeal bond in the penalty of $1,500.00, with Robert Goelet and Philips Phœnix as sureties; and the court having inspected said bond, doth now approve the same and doth declare the same sufficient; and said bond is now ordered to be filed, and the appeal heretofore prayed by said cross-complainants and granted by the court, is now declared perfected.

And said bond is in the words following, to wit:

Know all men by these presents that we, George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren,
109 and Theodore Chichester, all of the State of New York, as principals, and Robert Goelet and Phillips Phœnix, both of the city of New York, as sureties, are held and firmly bound unto William King, of the State of New Jersey, John W. Garrett, Robert Garrett, and T. Harrison Garrett, of the State of Maryland, James G. Ross, of the Dominion of Canada, the Ohio and Mississippi Railway Company, of the State of In-

diana, Allan Campbell, of the State of New York, and the Farmers' Loan and Trust Company, also of the State of New York, in the sum of one thousand five hundred dollars, to be paid to the said William King, John W. Garrett, Robert Garrett, T. Harrison Garrett, James G. Ross, the Ohio and Mississippi Railway Company, Allan Campbell, and The Farmers' Loan and Trust Company, their executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by *by* these presents. Sealed with our seals. Dated the twentieth day of April, one thousand eight hundred and eighty.

Whereas the above named George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, and Theodore Chichester have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Indiana, sustaining the de-
110 murrer to the cross-bill therein brought by the said George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, and Theodore Chichester and others, and dismissing the said cross-bill with costs for want of equity:

Now, therefore, the condition of this obligation is such that if the above-named George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, and Theodore Chichester shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

| | |
|---|---|
| GEO. HENRY WARREN. | [SEAL.] |
| N. B. WARREN. | [SEAL.] |
| S. WHITNEY PHŒNIX. | [SEAL.] |
| G. HARRY WARREN. | [SEAL.] |
| T. CHICHESTER. | [SEAL.] |
| ROBERT GOELET. | [SEAL.] |
| PHILLIPS PHŒNIX. | [SEAL.] |

Sealed and delivered in the presence of—

As to George Henry Warren, Stephen Whitney Phœnix, G. Harry Warren, T. Chichester, Robert Goelet, and Phillips Phœnix—

SAMUEL R. BETTS.

As to Nathan B. Warren—

JOHN C. GREENE.

SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York*, ss:

I certify that on this twenty-second day of April, 1880, before me personally appeared the above-named George Henry Warren, G. Harry Warren, and Theodore Chichester; and on the twenty-third day of April before me personally appeared the above-named Robert Goelet and
111 Phillips Phœnix; and on the twenty-fourth day of April before me personally appeared the above-named S. Whitney Phœnix, all to me personally known, and known to me to be the individuals described in

and who executed the above undertaking, and they severally acknowledged to me that they executed the same.

SAMUEL R. BETTS,
*United States Commissioner, Southern District of New York.*

SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

Robert Goelet and Phillips Phœnix, two of the subscribers to the foregoing undertaking, being severally duly sworn, say, each for himself, that he is a resident and freeholder within this State, and is worth the sum of three thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

ROBERT GOELET.
PHILLIPS PHŒNIX.

Sworn to before me this 23d day of April, 1880.
[SEAL.] SAM'L R. BETTS,
*United States Commissioner, Southern District of New York.*

SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

I hereby certify that I have examined the above-named sureties, Robert Goelet and Phillips Phœnix, on oath, and from such examination, believe them to be sufficient.

112 SAM'L BLATCHFORD,
*Circuit Judge of the Second Judicial Circuit.*

APRIL 27th, 1880.

NORTHERN DISTRICT OF NEW YORK,
*County of Rensselaer, ss:*

I certify that on this first day of May, 1880, before me personally appeared Nathan B. Warren, to me personally known, and known to me to be the individual described in and who executed the above undertaking, and acknowledged that he executed the same.

JOHN C. GREENE,
*U. S. Circuit Court Commissioner Northern Dist. of New York.*

113 UNITED STATES OF AMERICA,
*District of Indiana, ss:*

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district of Indiana, do hereby certify that the above and foregoing is a full and true copy of the bill of complaint filed November 17th, 1876, of the amended bill filed June 4th, 1877, of the supplemental amendment to the amended bill, filed September 29th, 1877, in the cause of William King et al. vs. The Ohio & Mississippi Railway Company et al., No. 4785, in said court; also a full and true copy of an order made and entered on the 10th day of August, 1877, in the cause of Allen Campbell vs. The Ohio & Mississippi Railway Co. et al., No. 5416, in said court, and of an order made and entered on the 18th day of January, 1878, in said cause No. 5416, and of an order made and entered on the 18th day

of February, 1878, in said cause No. 4785, and of an order made and entered on the 9th day January, 1879, consolidating said causes numbered 4785 and 5416, also a full and true copy of an order made and entered December 4th, 1879, and of the cross-bill of George Henry Warren et al., and of the answer of George Henry Warren et al., to the bill of complaint, and of the demurrer of John W. Garrett et al., and the demurrer of the Ohio and Mississippi Railroad Co. et al., and the demurrer of Allan Campbell, trustee, to the cross-bill of George Henry Warren et al., all filed on the 4th day of December, 1879, as of October 31st, 1879,
114 also, a full and true copy of an order of court made and entered March 30th, 1880, and of an order of court made and entered May 8th, 1880, and of the appeal-bond filed May 8th, 1880, in said consolidated causes under No. 4785 in said circuit court, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said circuit court at Indianapolis, in said district, this 19th day of August, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

June 2, 1880, rec'd of Taylor, Rand & Taylor, 21.35.

NOBLE C. BUTLER, *Clk.*

June 26, 1880, rec'd of Taylor, Rand & Taylor, 11.70, bal. cost for additions to transcript.

NOBLE C. BUTLER, *Clk.*

(Indorsement on cover:) No. 268. George Henry Warren, Nathan B. Warren, Stephen Whitney Phœnix, G. Harry Warren, & Theodore Chichester, appellants, vs. William King, John W. Garrett, Robert Garrett, T. Harrison Garrett, James G. Ross, The Ohio & Mississippi Railway Company, Allan Campbell, and The Farmers' Loan & Trust Company. Indiana C. C. U. S. Filed 20 September, 1880.

108-389

OFFICE SUPREME COURT U.S.
FILED
APR 19 1888
JAMES H. McKENNEY, CLERK

# Supreme Court of the United States.

No. 268.

GEORGE HENRY WARREN and others,

*Appellants,*

*vs.*

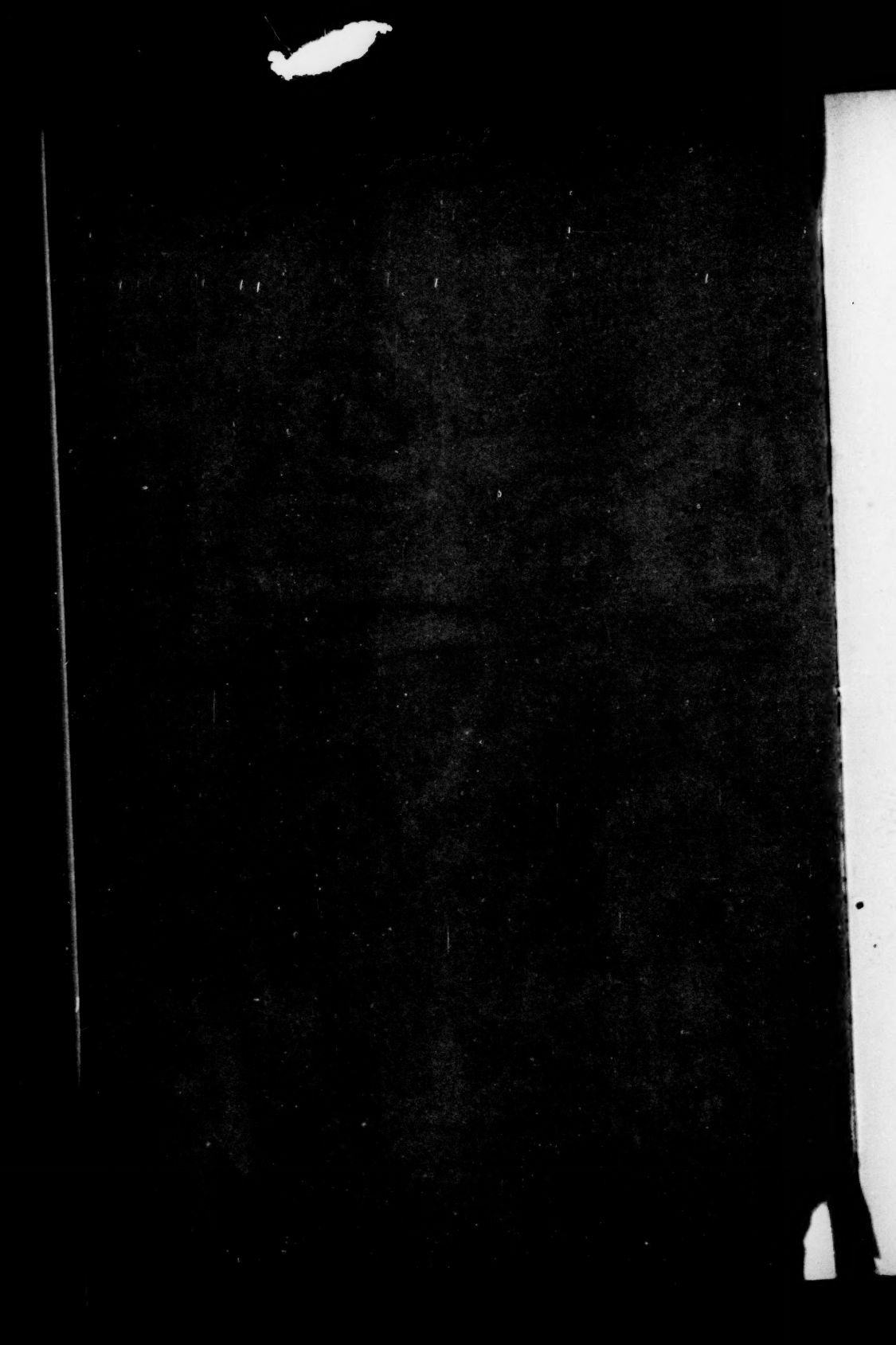
WILLIAM KING and others,

*Respondents.*

# BRIEF FOR APPELLANTS.

PORTER, LOWREY, SOREN & STONE,
*Appellants' Solicitors.*

GROSVENOR PORTER LOWREY,
*Of Counsel.*



# Supreme Court

OF THE UNITED STATES.

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GEORGE HENRY WARREN and others,
Appellants,

*vs.*

WILLIAM KING, and others,
Respondents.

*No.* 268.
*Brief for Appellants.*

## Statement.

This is an appeal from a decree of the Circuit Court of the United States for the District of Indiana, sustaining a demurrer of the Ohio and Mississippi Railway Company and certain of its *second* mortgage bondholders, to a cross-bill of the appellants, and dismissing the cross-bill for want of equity (fol. 108).

The appellants are certain preferred stockholders in the respondent, the Ohio and Mississippi Railway Co. They claim to have a specific lien on the property of the company, next after the lien of the first mortgage executed by the corporation, in 1867.

The corporation was formed under the laws of Illinois and Indiana, in the year 1867, by consolida-

tion of two companies of the same name, one in Indiana and Ohio, the other in Illinois.

The cross-bill is filed by the appellants on behalf of all the preferred stockholders, the entire issue of preferred stock being $4,300,000 (fols. 47, 98).

The cross-bill was substituted for, and took the place of, a petition, presented by the appellants and others, for leave to be admitted as parties in two suits, which had been brought to foreclose two mortgages executed by the Railway Company, and which had been consolidated into one cause by an order entered January 9, 1879 (fol. 44).

The first of these two mortgages was executed by the Railway Company in 1867; the other mortgage was executed by the Company in 1871. In each of these mortgages the mortgagees were the same persons, to wit, the respondent, Allen Campbell, and another since deceased (fols. 66–69).

Of these foreclosure suits, that brought upon the mortgage of 1871, or *second* mortgage, was commenced first, and formed the suit called below No. 4785. (Fol. 1.) The bill therein was filed by some of the bondholders for all, on November 1, 1876.

The bill to foreclose the mortgage of 1867, or "*new*" mortgage, was filed last, and Allen Campbell, the complainant therein, being also the trustee in the second mortgage, he sought the foreclosure of both mortgages in that suit. (Fol. 68.) This bill was filed August 10, 1877, and formed suit No. 5416 (fol. 41).

The various proceedings in these foreclosure suits prior to the filing the cross-bill of the present appellants in the consolidated cause, are set forth in the Transcript, fols. 23 to 45.

The preferred stockholders were not made parties to either of these foreclosure suits, original or con

solidated, and, their lien being disputed, they obtained leave on their petition to become parties to both suits, and to make their election as to the form of their pleading. They accordingly elected to be made parties defendant in the consolidated cause, and filed an answer to the bills in the suit of the second mortgage bondholders (fols. 96, 45).

They also filed a cross-bill against the above respondents, William King, John W. Garrett, Robert Garett, T. Harrison Garrett, John G. Ross, The Ohio and Mississippi Railway Company, Allen Campbell, and the Farmers' Loan and Trust Company (fol. 47).

Three demurrers were interposed to this cross-bill for want of equity (fols. 101, 103, 105). One of these demurrers was a joint and several demurrer, filed by the Ohio and Mississippi Railway Company and William King and three other persons, being *second* mortgage bondholders (fol. 103). After argument on the merits before Drummond, *C. J.*, and Gresham, *D. J.*, the Circuit Court sustained *this* demurrer on Feb. 25, 1880; and on March 30, 1880, entered a decree sustaining the demurrer and dismissing the cross-bill for want of equity (fol. 107).

See Opinion, 2 Federal Reporter, 36.

The appellants duly appealed from the decree sustaining the demurrer and dismissing their cross-bill (fol. 108).

The cross-bill sets forth in detail the facts and circumstances, and agreements, under which the preferred stockholders acquired and hold their specific lien on the property of the Company, as follows:

The Ohio and Mississippi Railroad Company was incorporated in Indiana, in 1848 (fol. 48). This charter was confirmed and adopted, so far as applicable to the State of Ohio, by an act of that State passed in 1851 (fol. 50).

A corporation of the same name was also chartered in Illinois in 1851, to construct a railroad from the Mississippi river to Vincennes in Indiana, with power to unite its railroad with any other in Indiana, upon terms to be agreed on between the companies so connecting (fol. 51).

The Illinois company made two mortgages on its road. The second mortgage was foreclosed and the road and franchises sold in June, 1862, to the Ohio and Mississippi Railway Company, a corporation chartered in the State of Illinois, for the purpose of acquiring the same (fol. 52).

Afterwards, in 1867, the Indiana company was also foreclosed, and its road and franchises purchased by the respondent, Allen Campbell, and others, Trustees (fol. 53). These purchasers thereupon on the 4th of November, 1867, organized a corporation under the laws of Indiana, also called the Ohio and Mississippi Railway Company (fol. 54).

On the 21st of the same month, to wit., November, 1867, special meetings of these two reorganized corporations were held, and the two companies were duly consolidated (fols. 54, 55). The articles of consolidation form Exh. B (fols. 84, 86).

Before either of the original companies had been foreclosed, an agreement had been signed by creditors and stockholders of the original Indiana company, dated December 15, 1858, known as the "trust agreement" of that year. By this agreement the said Allen Campbell and others, were created trustees for thepurpose of protecting judgment creditors and other lien holders, and the unsecured creditors and stockholders of the original Indiana company. The holders of all these interests assigned them to the trustees ; so that, for a long time before the consolidation of 1867 these trustees were the owners, subject to the terms of the trust agreement, of the interests of all the stockholders of the original In-

diana company, and of all its creditors, excepting a *portion* of the bondholders who were secured by the first mortgage executed by that company, in 1853 (fols. 55, 56.)

The trustees had issued two classes of certificates in payment and exchange for the interests conveyed into the trust, determined by the priority of those interests in point of right and lien, namely, "preferred" and "common" certificates. These preferred certificates secured the holders a preference, not only in respect of interest-money on the amount thereof, but also priority of right in and security upon the trust property, subject only to existing prior mortgages (fol. 56).

In April, 1863, shortly after the foreclosure of the original Illinois company, in pursuance of an amendment of that date to the trust agreement of 1858, the trustees purchased all the stock of that company and a portion of its bonds, and in pursuance of a further amendment made March 28, 1867, the same trustees bought in the property and franchises of the Indiana company at its foreclosure in 1867 (fol. 57).

In this manner, on September 10, 1867, the entire property of both companies had become the property of the trust, subject to the mortgage bonds outstanding and amounting to about $4,000,000 (fols. 57, 87, 92).

On the 10th of September, 1867, the holders of the trustees' certificates made an additional amendment to the trust agreement of 1858 (fols. 87-95). This amendment recites the purchase by the trustees of the entire line of railroad of the two original Companies; that the parties intend to form a new corporation, to which the entire property of the trust should be transferred; that by an amendment of March 28, 1867, the certificate holders had authorized the formation

of such corporation and "*the creation of a large amount of assessable scrip stock to be used for the building of new roads and branches,*" and that it was recommended to alter the plan of organization and "to leave more discretion to the new corporation" (fols. 87, 88). The certificate holders thereupon resolved to rescind the assessable scrip stock amendments, and in lieu thereof, resolved, that on confirmation of title by the Courts the trustees should form a new corporation for the purposes *and with the obligations* following:

1. To receive from the trustees the railroad in Indiana and Ohio, and all the stock, bonds, claims, etc., of the Illinois Company and all other property belonging to the trust.

2. The capital stock of the new company to consist of 35,000 shares of preferred stock, and 200,000 of common, the $23,500,000 of stock to be exchanged at par, for preferred and common trust certificates, and *interest* on the preferred certificates to be paid from January 1, 1867, to the day fixed for conversion.

3. The parties further agreed as follows: "It "shall be declared upon the face of said preferred "stock, *that it is to be and remain a first claim upon* "*the property of the corporation after its indebt-*"*edness;* that the holders thereof shall be entitled "to receive from the net earnings of the Company "*seven per cent. per annum* upon the amount of "said stock, payable semi-annually, and to have "*such interest* paid in full for each and every year "before any payment of *dividend* upon the com-"mon stock of said corporation; and that when-"ever the net earnings of the corporation, which "shall be applied in payment of *interest* on the "*preferred* stock and of *dividends* on the *common* "stock, shall be more than sufficient to pay both "said *interest* of seven per cent. on the preferred "stock in full, and seven per cent. *dividend* upon

"the common stock for the year in which said net "earnings are so applied, then the excess of such "net earnings, after such payments, shall be *di-* "*vided* upon the preferred and common shares, "equally, share by share." (Fols. 59, 90.)

4. The new company was "authorized" to create "*a new mortgage* on the entire property of the "corporation, consisting of 340 miles of railroad, "from Cincinnati to St. Louis, and upon the *con-* "*templated improvements* thereon, for an amount "not exceeding $6,000,000," $4,000,000 thereof to be set apart and used solely to take up "the present mortgage bonds" (fol. 91).

5. A connection with Louisville was also authorized to be built if deemed important, and in that case the new company was authorized to increase the preferred stock, and "to provide in the mortgage for $6,000,000 *above contemplated*," that the same might be increased by $15,000 per mile of the connection (fol. 92).

The Indiana statute of March 3, 1865, for the reorganization of railroad companies, in its 5th section provides that such new corporations as it authorized, "may make preferred stock, make and establish preference in respect to *dividends* in favor of one or more classes of stock over and above other classes, and *secure* the same in such order and manner, and to such extent as said corporation may deem expedient" (fol. 60).

In pursuance of this statutory authority and the agreement of the certificate holders, the reorganized Indiana corporation was formed by the trustees and was consolidated with the Illinois company. The articles of consolidation provided that the respondent company should "assume all the debts, liabilities and obligations" of the constituent companies; should have a preferred stock of $3,500,000, and a common stock of $20,000,000; should be authorized to create a new mortgage of $6,000,000,

$4,000,000 thereof to be appropriated and used to take up the existing mortgages, and that the consolidated company should have the powers and rights contemplated in the amended trust agreement (fols. 84, 85, 61, 62).

The consolidated company issued the authorized amount, of common and preferred stock, and the preferred certificates contained the exact declaration called for by the amended trust agreement (Ex. D. fol. 94).

The new mortgage for $6,000,000 was executed on December 24, 1867, and was subsequently increased, on the building of the Louisville Branch, to $6,800,000, and $800,000 additional preferred stock was then also issued.

On March 25, 1871, the company proceeded to execute a second mortgage on all its property and franchises to secure $4,000,000 (fols. 66, 67).

In 1875 the respondent company assumed to purchase 220 miles of railroad, known as the Springfield Division, not contemplated in the original consolidation, or in any way provided for or mentioned in the proceedings of the parties, and mortgaged that road to the respondent, the Farmers' Loan and Trust Co., to secure $3,000,000 (fols. 15, 68.)

This purchase and mortgage is claimed by the appellants to be illegal and *ultra vires*.

The bondholders under this mortgage claim that the consolidated company is bound to pay interest on their bonds next after the interest on its "new" and "second" mortgages, and also to pay the principal of their bonds (fols. 69, 71).

The railway company has defaulted on all the three issues of bonds above mentioned (fols. 71, 68). Receivers have been appointed in the suit No. 4,785, brought by the second mortgage bondholders, who have applied surplus net earnings of the road to the payment of five coupons of the second mortgage bonds, instead of applying the same to the payment of the appellants or other preferred stockholders (fol. 74).

The appellants assign as errors :

1. That the Court below erred in sustaining the said joint and several demurrer of the defendants, The Ohio & Mississippi Railway Company, William King, James G. Ross, and John W. Garrett, Robert Garrett and T. Harrison Garrett, to the said cross-bill of the appellants, and in dismissing said cross-bill for want of equity.

2. That the Court below erred in sustaining the several demurrer of the defendant, William King, and the other individual defendants, holders of the said second mortgage bonds, to the said cross-bill, for that the said preferred stockholders are entitled to a lien and security upon the property covered by the said second mortgage prior and superior to the lien thereon of the said second mortgage bonds.

3. That the Court below erred in sustaining the said several demurrer of the defendant, The Ohio & Mississippi Railway Company, to the said cross-bill, for that the said preferred stockholders, appellants, are entitled to a lien and security upon all the property of the said company, (or upon so much thereof as was delivered over to it by the said trustees under the said trust agreement of December 15, 1858, as amended, and was subsequently acquired by means of the proceeds of new mortgage bonds and other securities therein authorized,) next prior to the lien of the aforesaid second mortgage bonds, or, if not, then prior to the said Springfield Division bonds, or, if not, then prior to any right of payment to the holders of the common stock of said company, of the amount of their shares, or any part thereof.

## POINTS.

**I.** The question presented by this record is a simple one. It arises between the holders of preferred shares of this company upon whose property the second mortgage purports to be a lien, and parties seeking to enforce a second mortgage executed by the Ohio & Mississippi Railway Company March 25th, 1871, ~~together with certain other claims asserted against the company~~, and seeking also, virtually, to enforce against the property and revenues of the Ohio & Mississippi Railway Company other claims alleged to be owing by that company for interest upon bonds secured by mortgage on a certain branch road, called the "Springfield division;" which road was not the property of the Ohio & Mississippi Railway Company at the time of the creation of the preferred shares; and also other indebtedness of said Railway Company, created subsequently and not secured by mortgage.

**II.** It is claimed by the preferred shareholders who filed this cross-bill, that their preferred shares represent *an indebtedness which was secured by a lien* upon the property of the Ohio & Mississippi Railroad Company on and prior to December 15th, 1858, at which date they united in a trust agreement for the purchase on a sale under foreclosure of the Ohio & Mississippi Railroad, extending from Cincinnati to Vincennes. This agreement by subsequent amendment dated April 17th, 1863, was virtually extended so as to include the purchase of the remaining portion of the road extending from Vincennes to East St. Louis (Record, folio 87).

These original claims, being secured by a lien as above stated (subject to certain then existing mortgages upon the same property), were, by the trust

agreement and amendment aforesaid, and various cotemporaneous arrangements, on the 10th of September, 1867, retired one step in the order of their priority, for the purpose of allowing the creation of a "new" first mortgage, to an amount sufficient to replace the old first mortgage, and raise certain other necessary funds.

Nothing in the history of these transactions indicates any purpose or motive in the holders of the secured claims now represented by preferred stock, to do more than take a *second* place in the order of liens upon the only property then belonging or expected or contemplated by the agreement to belong to said Company. The language employed in the amendments to the agreements adopted by the certificate holders, who were then the holders of the entire property, on the 10th of September, 1867, is to the effect that, in consideration of the transfer to a new corporation which is to acquire it, of the entire property, a capital stock shall be created and delivered consisting in part of 35,000 shares preferred stock (folio 89), which preferred stock "is to be and remain a first claim upon the property of the corporation after its indebtedness," and to bear interest at the rate of seven per cent. per annum, payable out of net earnings for each and every year.

The same instrument provides as a condition of the transfer, and the acceptance thereof, that the new corporation shall be authorized to create "*a new*" mortgage for an amount *not exceeding* six million dollars (folio 92), which may however, contingently upon the construction of a certain branch to Louisville, be increased to the further sum of fifteen thousand dollars per mile for each mile of such branch line. The new corporation was (folio 93) to assume the obligations and liabilities of the trustees for the holders of certificates about to be exchanged for preferred shares, and to undertake the execution and obligation of these amendments. The arrangement was completed and carried into effect and

the property delivered to the new company-purchaser, with authority by the sellers to create a first lien upon the same for the amount mentioned ; and simultaneously payment was made in part in preferred stock which was, as already stated, to be and remain a first claim for ever upon the property after its indebtedness (see certificate of preferred stock, Exhibit D, fols. 94, 95).

The preferred stock was thus constituted in effect a purchase money mortgage for securing and enforcing the obligations assumed, and reserving a lien upon the property sold, subject only to the limitations expressed in or justly inferable from, the language of the amendments, the stock certificates, and the circumstances under which the transfer was made.

Vendors Lien - sustained in Equity after possession passed, against all except purchasers without notice. Maxfield v Symmons, 15 Ves. 329; Waite's Actions and Defences, p. 321.

**III.** The plaintiffs in the cross-bill (appellants) assert that the term "indebtedness," as employed in the amended agreement and in the certificate of preferred stock, related *only* to the indebtedness mentioned in the agreement as concurrently existing or then authorized.

The defendants in the cross-bill, on the contrary, seek to give the term a broader interpretation, and claim that it created in the Company a right to create new and unforseen indebtedness to an unlimited amount and to secure such indebtedness upon the property and its earnings, in priority to the peculiar stock issued in payment for that property and which is above spoken of as being in effect a purchase money mortgage.

The chief difficulty encountered by the preferred shareholders in enforcing the claim which, as they conscientiously assert, was well understood by all parties at the time, and was continuously acted on for four years, *i.e.*, until the execution of the second mortgage in 1871, arises from the natural tendency

to construe this preferred stock, notwithstanding the peculiarity of its terms and of the circumstances of its creation, according to the ideas which in the subsequent development of railroad enterprises have, by custom and assent, come to be applied ordinarily to preferred stock of the ordinary sort now so well known to the courts and to the commercial community.

A true understanding of this case can be obtained, and justice to the preferred shareholders can be done, only, by dismissing from any influence upon the judgment what may be called the subsequent development of the law of preferred stock; and by bringing the mind to realize what was *at the time* known concerning this special kind of security; which, in the edition of Judge Redfield's work, published in the year when *this* preferred stock was authorized, was declared to be "*only a form of mortgage*" (2 Redfield, 598, 3d ed.).

In seeking for those equities which must largely guide the judgment of the Court, in determining the rights of parties in doubtful cases, it will, perhaps, be almost universally found, that the holders of preferred stock in companies are adventurers for profit along with other shareholders, and have received their preference solely to distinguish them from other adventurers for a like profit, whose advances and sacrifices have been less meritorious. In such cases, there can never be any difficulty in determining that all creditors made such by the two classes of adventurers borrowing in their character as stockholders, from persons who are not to be participants in the profits of the venture, will be entitled by fundamental principles of law to have all property of the shareholders applied first to the payment of debts.

But that is not this case. The holders of these preferred shares were creditors of the original owners of this property, having liens for their security, and were not participants in profits. They were farmers who had sold rights of way, fur-

nishers of equipment having a statutory lien, lenders of funds secured by mortgage and judgment creditors (fol. 56). The scheme of re-organization did not require the equities pertaining to their relation to the property as creditors and lienors, to be disturbed or changed in order to carry out the common object, except so far as was needed to allow the company to create a single prior lien, to the limited amount requisite and expressly named.

The terms employed for this object, taken nakedly and alone, are sufficient in their grammatical construction and ordinary interpretation to accomplish this limited purpose. But assuming for the moment that the words "shall be a first claim upon the property of the corporation after its indebtedness," may, without violence either to grammatical construction or to common sense, be read as if they were "Shall be a first claim, etc., after all its indebtedness at present existing or hereafter to be incurred;" equally well they may be construed so as to read, "Shall be a first claim, etc., after all its indebtedness at present existing." What under all the circumstances of the case, was probably the intention of the parties?

**IV.** The persons who received the preferred and common shares then created were, for the moment, the sole owners of the property, as capable, for all which appears, to continue in its occupation and to attach to it other lines and to charge themselves as its owners with liability to pay for such new property, as any new organization could be. The object of the new owner was solely to acquire this existing property. The object of the sellers in parting with it was to retain all the advantages of their then position, consistent with the creation of one debt of prior security to the amount of six million

dollars. This seems clearly inferable from the fact that in parting with it they assumed to give permission to create this *single* lien upon it and no more, in advance of their claims ; and that this permission was accepted by the purchaser.

*The single exception—that this limited amount might be increased and secured by priority to build a branch to Louisville—seems clearly to exclude additional exceptions, such as the creation of still greater indebtedness with priority, to build or acquire the Springfield division, an entirely foreign and incongruous additional road (fol. 14).*

If the purchaser had intended to claim a power of larger scope, more prejudicial to the then position of the holders of preferred certificates, is it not fair to assume that express terms would have been employed, adequate to create this right beyond question? Is it not clear that, as between the parties, the sellers intended to limit, and the purchaser intended to be limited by, an obligation to create no indebtedness which should take precedence of this "first claim upon the property, of the corporation," other than what was expressly authorized? It is believed by the appellants that it cannot be doubted, that if they had had notice of a purpose, at any time, in the corporation, to create another mortgage which should expressly declare that it was to secure a lien upon the property, in advance of the preferred stock, that such an issue might have been restrained as being in breach of the conditions of the sale.

Why were pains taken to limit the amount of the "new" mortgage, if *all* indebtedness was to be prior to the preferred stock? Suppose the new corporation had attempted to create a "new" mortgage of *ten* million dollars, would it not have been restrained by an injunction, upon the ground that this would be putting ten million dollars, instead of six million as expressly limited, ahead of the "first claim" of the preferred shares? If this could not be done, can the company make one mortgage for six millions and another for four millions and give to both the precedence forbidden to one?

If the new corporation might not borrow ten millions under a first mortgage, but might still borrow six by a first mortgage, and four by a second mortgage which should equally have priority of lien over the preferred stock, would this not furnish a striking example of sacrifice of substance to form?

**V.** It will be profitable here to scrutinize the terms of the amendments to the trust agreement of Dec. 15, 1858 (fol. 87).

These amendments recite:

1. That the whole line of railroad has become the property of the trust "subject only to the mortgage bonds outstanding" (to wit, for four million dollars).

2. That it is the intention of all parties interested in the trust to form a corporation to which the entire property of the trust may be transferred, subject to existing liabilities and obligations.

3. That by certain prior amendments to the agreement of 1858 there was authorized "the creation of a large amount of *assessable scrip stock* to be used for the purpose of building *new roads and branches.*"

4. That it has been recommended by parties largely interested, and advised by counsel, to alter the plan of reorganization contemplated by the last-named amendments, "and to leave more discretion to the new corporation" (fol. 88).

5. After these and other recitals it is provided that the purposes and obligations of such a corporation shall be as follows:

(*a*) "To receive from the trustees the property, and to issue to the owners of preferred trustees'

certificates, preferred stock, upon the face of which "it shall be declared that it is to be and remain a "first claim upon the property of the corporation "after its indebtedness," and which shall entitle the holders thereof to receive from net earnings of the company *interest* at the rate of seven per cent. per annum.

(*b*) "That the new corporation shall be authorized to create *a new* mortgage, &c., for an amount not exceeding six million dollars," of which four millions are to be reserved for taking up the outstanding four millions, which were then a lien; the remainder evidently to be used (by way of giving "more discretion to the new corporation") in place of the "large amount of assessable scrip stock, to be used for the purpose of building new roads and branches."

(*c*) That "on the due transfer of the property to the corporation," and upon its "assumption of the liabilities and obligations as aforesaid," the trust was to be discharged.

It is not claimed that there is here shown any intention to limit the corporation in its necessary power of borrowing; but it is claimed that it was intended to limit its power to create liens in advance of the claims of vendors, whose trustees were engaged in conveying the property subject to these limitations and obligations.

**VI.** It will perhaps be excused if it appears too elementary or too strained an application of legal hermeneutics, to quote certain fundamental principles of jurisprudence, which seem fundamental to the rights of the appellants in this case.

"*The beginning and cause of every contract are to be considered. Uniuscujusque enim contractus initium spectandum est et causa.* Dig. xvii. 1. 8."

This maxim only expresses an elementary principle, which must guide all courts of law in the pursuit of justice. It is, of course, specially applicable to cases of real or apparent ambiguity; but it would also seem particularly necessary and appropriate, to prevent the rights arising under special and peculiar circumstances from being dealt with according to conventional rules applicable to a class of securities having the same name and general appearance, but which are in the main, if not entirely, quite different in their origin and legal conditions from those which are now brought to the attention of the Court.

The beginning and cause of the contract which is the foundation of the title of the Ohio and Mississippi Railway Company are easily ascertainable from the single document, Exhibit C and are stated above. The contract arose in the necessity for a reorganization and for certain specific powers to raise and secure moneys. Beyond this there was nothing in that "beginning, &c.," which required the displacement of the preferred certificate holders from their then existing and absolute "first claim" on the property (fol. 87).

The rule cited is declared by Phillimore (Principles and Maxims of Jurisprudence) at page 337, to be as invariable as the equity from which it emanated.

Closely related to this principle in its application to this case is another:

"*Whenever there is ambiguity in the words of a stipulation, it is best to adopt the sense which places the thing in question out of danger.*" "*Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur in tuto*

*sit.*" Dig. de Verb. Sign., 80. (Phillimore, page 332.)

The *res gestae* show that the parties were engaged in a scheme involving substantially only three elements:

1. The new corporation desired to acquire the property.

2. The then owners, having acquired their title by indirect execution of a lien in their favor as creditors, desired to part with it under a certain condition.

3. This condition, mutually agreed upon, was that the new purchaser should be limited in his general power of encumbering the property about to be acquired.

4. After a single prior lien to secure a specified indebtedness, the original lien of the vendors was to be and remain a first claim upon the property.

The instrument executed to accomplish these purposes (folio 90) exhibits possibly an ambiguity in two particulars:

1. An ambiguity as to the meaning of the term "indebtedness."

2. An ambiguity as to whether the indebtedness referred to was to be the indebtedness, pertaining to the property as then existing and by the same instrument authorized, or the indebtedness of the corporation.

In either case the indebtedness was the same and to be for the same amount. The interests in danger were the interests of the corporation, and of the vendors. That of the corporation was to obtain a good title to the property; and this is well guarded by the scope of the instrument and its simultaneous performance by the vendors. The interest of the vendors was their relation to the property, which they designed to secure against the inter-

vention of any new and superior claims, except specified claims and amounts.

These motives in the minds of the parties guided them, and cannot now be overlooked in any adjudication intended to effect their joint purposes at the time. In considering and elucidating the ambiguities, if any, found in the instrument adopted by them to effect these purposes, it is therefore proper in the language of the maxim to adopt that sense which places the interest and things which were then in question out of danger. The interest which preferred certificate holders had to guard should be looked at as if the Court had now to guard that interest—and all language used at the time must be interpreted so as to secure that object, if such interpetation is possible.

**VII.** But it will be said that this question arises not between the parties to the agreement of sale, but between shareholders of the corporation chargeable with notice of its acts, and creditors under a mortgage which declares that it is ~~second~~ subject to certain existing liens, to wit, the first mortgage of six million dollars, and, by inference, that it is not ~~second~~ subject to any other lien.

For the purpose of testing the argument thus suggested, it is necessary, first, to give full effect under the state of the pleadings to the allegation of the cross-bill that all the rights of the appellants, as alleged therein, were fully known to the trustees and holders under the second mortgage, and to all other persons claiming lien or charge upon the property of the company subsequent to the said first mortgage, long before the dates of their alleged liens or encumbrances; and to the fact that these subsequent creditors, possess no equities arising from the fact of their being creditors, superior to the equities belonging to prior creditors, whatever might be the form in which, under the various ar-

rangements described, their respective claims were represented. (Fo. 70.)

When these prior creditors changed the method in which their claims were represented, by the acceptance of preferred stock—which at that time was little known, except as a method of borrowing equivalent to the English way of raising money by debentures which are a charge upon the property (Law Reports, 4 Equity Cases, 601),—they made use of terms adequate at the time to establish, as between themselves and the new company, the new relation as creditors which has been described. They owed no duty to subsequent creditors to make use of terms larger than was necessary for the purpose then in view; especially as, if the interpretation of these arrangements now sought to be established is correct, there were to be no such subsequent creditors, at least none who could look for a priority of claim upon the property. All earnings were in the nature of things to be applied to the payment of expenses and charges necessarily incurred in making earnings, but all net earnings and the property itself were subjected to this claim for interest, equal, if not superior, to any similar claim, except that for interest on the permitted mortgage. It is claimed, therefore, that while, if a development of the comparatively modern practice of creating preferred stock which is inferior to the claims of all creditors, had been foreseen; or if the possibility that this new corporation, possessing the limited power to own and operate the main line and one branch to Louisville, would acquire other lines not then contemplated by the creation of such indebtedness, had been foreseen, terms more explicit might with propriety have been used; still, enough was said in the then "state of the art," [to use the language of the patent law,] to establish, as between the parties, the rights of these preferred shareholders just as they are now interpreted by them.

What then was the duty of subsequent creditors, having a knowledge of all the facts? And what would naturally have been their course had they

See re Brunswick Construction Company.

As to debenture stock see Sweet's Law Dictionary; Companies clauses act 1863 (26 Vict. c. 118.) §§22—24 — such stock may be perpetual, i. e, irredeemable, and possess all the rights and privileges of other stock

and the company, at the creation of the second mortgage, had a desire, and the purpose, now asserted, of obtaining a lien which should exclude these former creditors from a relation of which they all had notice, and to which, as later comers, they were bound to give the utmost effect which the words employed and the facts and circumstances under which they were so employed would allow? It was competent to the trustees of the second mortgage and to all other creditors seeking a preferential lien, to have required the assent of these preferred shareholders. They were a body of individuals whose names were written in the stock books of the company. Every such preferred shareholder could have been made to receive actual notice of what was meant to be claimed, and expected to be attained, under the new indebtedness about to be created. The position of the lenders enabled them to require the company to produce this assent. These subsequent creditors had necessarily a knowledge, which the preferred shareholders as a body did not necessarily have, of what was about to be done, and of the understanding and interpretation intended to be imputed to it. The presumptive notice to the shareholders of what was being done by the officers of the company, should, in a Court of Equity, have little weight in favor of those who, having all knowledge of the facts, and resting under all the obligations arising from such knowledge, had, and did not avail of, the opportunity to bring actual notice to the intelligent understanding of each preferred shareholder. It is obligatory upon him who seeks equity not only to do, but to have done, equity. The prior creditors in their substituted character as preferred shareholders—a charcter assumed only for convenience and plainly exhibited throughout the company's muniment of title,—were first in time and should be considered first in right, against all subsequent comers who might, by the simple process of requiring the company to give notice and obtain assent, have either made their own title absolutely clear, or have saved these prior claimants from the

prejudice and embarrassment to which they are now subjected.

**VIII.** It is said in the opinion of the Court below (Reported in *Federal Reporter*, vol. 2, pages 36 and 41), "If the claim of the preferred stockholders is valid, the second mortgage creditors may well ask when is their debt to be paid" It is respectfully submitted, that this question has not the force of argument which it is apparently supposed to have; since it is the same question which might be asked upon a foreclosure of the first mortgage. It is not any supposed difficulty in collecting a claim which will give it a priority of lien. These creditors, who knew all the facts when they became such, must look for their payment to such of the property and funds of the Company as were at the time liable to be charged.

It is added in the opinion: "It is only by construction not very clear or satisfactory that the claim of the preferred shareholders is sought to be made out in this case."

This bringe us to consider the proper interpretation of the term "indebtedness."

What is indebtedness? It is the state of *being* indebted; and the term without the aid of other expressed or implied terms, meaning, a present indebtedness, that is, the state of being *now* indebted, there is no occasion for construction. It is only when effort is made to extend the meaning of a word which taken alone, means only a *present* indebtedness, so as to include other indebtedness *thereafter* to be created, that it is necessary to resort to construction, and to supply a word, so as to make the sentence read "indebtedness or future indebtedness."

It is respectfully submitted therefore that the appellants' interpretation does not depend upon "construction," while the respondents' theory, dedeparting from the simple and natural reading, does need such aid.

**IX.** An effort has been made above to show that, if construction need to be resorted to, this construction is equally clear and equally satisfactory, which saves with that other construction which excludes the claim of the preferred shareholders. It is only by reading these words in the light of subsequent experience, that the difficulty is made to appear aided by a complete ignoring of the fact that this dispute arises between claims of the *same class*, to wit, the claims of creditors. The special arrangements between the holders of preferred certificates, which were the representative of secured claims, and the holders of common certificates, which had no such security, by which the holders of the first class consented to aid in saving the property for the benefit of all, in consideration of a participation in certain remote profits, affords no fair aid in determining the relations between preferred shareholders and the class of creditors not contemplated at the time. These arrangements were not made because the holders of preferred certificates were originally adventurers for profit, but because they had consented liberally to aid in saving property for the benefit of shareholders who were at the time entirely at the mercy of then existing creditors. It would be misleading, therefore, to draw from this circumstance argument in favor of the respondents.

**X.** The opinion in the case of St. John against The Erie Railway Company, 10 Blatchford, 271, in the Circuit Court, where it had the most extended consideration, although afterwards affirmed in this Court, 22 Wall, 147, appears to afford a marked support to the claims of the preferred shareholders in this case. By the statement of negations, exceptions and qualifications appropriate

in that case, but which do not exist and could not be made in this case, the learned judge, in the very careful and closely reasoned opinion in that case, after stating the contention of the plaintiffs and his opinion that a fair and reasonable construction of the contract does not sustain the views urged on the part of the plaintiffs, proceeds by careful criticism and a consideration of what the contract in that case did *not* say and what that case did *not* show, to justify that opinion. First observing that the contract in that case provides that the holders of the *unsecured* bonds agreed to exchange them for preferred stock, to be entitled to preferred *dividends*, &c., he notes as essential facts or arguments:

1. That, "but for some expression of intention in a contract on that subject, the mere word preferred might be construed to mean" a preference over subsequent mortgages.

2. After a careful examination of the papers to ascertain what is covered by the term "preferred," he finds that it is only a preference in the payment of dividends, without any preference in respect to the final distribution of the funds, saying "The preferred stock is entitled to its specified dividends and is not entitled to anything else in reference to anything."

3. He notes as an important indication of an intention to cease to be a creditor and to become solely a stockholder, with no preference or advantage over other stockholders, except preference as to dividends, "That they acquired the same right to vote as the holders of common stock."

4. Having thus determined that this class of creditors had become mere stockholders, the opinion declares it unreasonable to suppose that the general power of the defendants to take leases of roads, to borrow money, to issue bonds, &c., is to be deemed "In the absence of any expressed intention," to be

subordinated to the rights of any class of stockholders; and a strong argument is drawn from the manifest injustice, under the circumstances of that case, of postponing the claims of lenders of moneys used to enhance the net earnings to the rights to dividends of any class of stockholders.

5. The argument is then carried irresistibly forward by tracing the pretensions of the plaintiffs in that case to their legitimate conclusion; and it is asked "If the company should become bankrupt, are the claims of these creditors to be repaid their principal, to be postponed to the claims of the preferred shareholders, in respect to the capital of their shares? Why not, if there is to be such postponement, as between interest to the creditors and dividends on the preferred stock? The stock is in the contract declared to be preferred stock, as well as to be entitled to preferred dividends. If preferred stock, why should it not have preference over the principal of subsequently created debts, if dividends on it are to precede the payment of interest on such debts? Yet such a claim would probably never be advanced, and certainly would not be admitted."

6. It is finally added that net earnings are properly the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings when all liabilities are paid; the remainder is the profit of the shareholders to go towards *dividends*. It is added that, in that case, the meaning of net earnings is interpreted by the contract, which states that the trustees are out of the net earnings to pay the floating debt under the delayed coupons; and that the contract, statute and certificates provide that the mortgage interest is to be paid out of the net earnings, and that these preferred dividends are to be paid out of the same net earnings "after payment of mortgage interest."

By retracing the steps of this argument and comparing it with the facts in our case, it becomes apparent, not only that that case is not an authority for the defendants in this cross-bill, but that, probably, had the facts existed in that case which exist in this, the line of reasoning employed would have led to a different result. Thus, the fundamental fact was, in that case, that a preferred stock had been issued to the holders of "*unsecured*" indebtedness.

In our case, the original preferred certificates of the trust were issued to parties having *secured* indebtedness, that is, indebtedness secured by lien upon the very property in question.

The preference was there found to be *only* a preference as to *dividends*, from which important conclusions were drawn, derogatory to the claims of a higher and more special interest made by the preferred shareholders.

But, in our case, it is expressly declared that the preferred stock is to be a "first claim *on the property.*"

In addition, it is not a claim for *dividends* which is asserted in our case, but a claim for *interest;* the interest being exactly equivalent to that which must have been paid upon the debts for which the preferred stock was issued.

Another argument unfavorable to the plaintiffs in that case was drawn from the fact that they abandoned the non-voting class of creditors and entered the voting class of stockholders.

But, in our case, the privilege of voting is no badge of a stockholding character with the creditor character eliminated, for (folio 92) it is provided that the holders of outstanding bonds of the *former* Ohio & Mississippi Railroad Company "and holders of bonds to be issued by the *new* corporation" are to be entitled to vote. In the new Ohio & Mississippi Railway Company, therefore, the voting class consists, under the amendments of September 10th, 1867, of the bonds existing and authorized,

(both of which are admitted to be prior to the preferred stock,) the preferred stock, and the common stock.

Again, in that case, it is assumed that there could be no pretence that, upon the bankruptcy of the company, the claims of any creditors would be postponed to the claims of the shareholders, in respect to the capital of their shares, and the absence of any expressed intention of this sort seems to control the argument.

But, in our case (if the interpretation of the term indebtedness upon which we insist be allowed), there *is* an expressed intention to that effect.

In that case, the opinion concludes by noting that net earnings, out of which dividends are to be paid, are by the agreement and by the statute defined to be such earnings as remain "after payment of mortgage interest."

In our case, there is not only no such definition or limitation, but on the contrary, instead of an obligation to pay dividends, there is an obligation to pay interest, which is as absolute as any other promise to pay *interest*. Taking, for example, the indebtedness for interest on the Springfield division bonds, which are not secured by a lien upon the property, is it not clear that our claim for interest is equal to their claim for interest, assuming for the moment that we, like them, are without any lien to secure our interest claims?

Our interest is expressly to be paid from net earnings, and net earnings are, in that case, defined to be "the gross receipts less the expenses of operating the road to earn such receipts." Thus the operating expenses being paid out of gross receipts and a surplus remaining, there remain standing together two claims against the company equally absolute, being a claim for interest in each case.

The bill entitled King *v.* The Ohio & Mississippi Railway Company (folios 2–22) sets up the existence of debts in addition to interest due upon mortgages secured upon the property, to wit, floating indebt-

edness and interest due upon the bonds secured on the Springfield division; and a receiver was appointed to administer the property in the interest of all this indebtedness and to the exclusion of our claim for interest, or at least with a priority of those claims over our claims for interest; and judgment in foreclosure is demanded, and that the mortgaged premises may be sold, and that these enumerated claims (excluding ours) may be paid "in their just priority."

The cross-bill, taking issue upon this assertion of a right of priority, asks judgment giving to us the priority, "so that, in case of foreclosure of said first mortgage, * * * all surplus after satisfaction of claims under said first mortgage be applied, first, to payment * * * of the par value of the preferred shares," and "so that, in case of foreclosure of either of said second or Springfield Division mortgages, the decree therein shall provide that any sale in either of such cases shall be subject, not only to the amount due under said first consolidated mortgage, but also, and next in order, to the amount at par of the preferred stock" (fol. 77).

**XI.** The amendments of September 10th, 1867, exhibit a scheme substantially as follows:

1. The trustees are shown to be owners of the property for the benefit of certificate holders, according to certain existing priorities between them, "subject only to the mortgage bonds outstanding," being four millions:

2. That property is to be transferred to a new corporation, who shall take it for certain purposes, and with certain obligations, named in the following order:

(*a*) To issue to the owners of preferred certificates preferred stock which shall be "and remain a first claim, etc."

(*b*) To create a new mortgage for a limited amount; to wit, "not exceeding six millions of dollars," which shall be prior to the "first claim" of the preferred stock.

(*c*) And the transfer of the property is to take place only "upon the assumption of the liabilities and obligations aforesaid." The "liabilities and obligations aforesaid" are evidently the existing obligations and liabilities of the trustees which included an obligation to hold the property in certain relations, subject to four millions of outstanding bonds and for the satisfaction of the principal of the outstanding preferred certificates.

(*d*) A liability by the new corporation for those outstanding bonds and such others as might be issued, and next an obligation on its part not to increase that indebtedness beyond the amount of six millions.

Thus the new corporation appears to have taken title subject to a covenant *to maintain the then existing priority of claim*, except so far as they were permitted to postpone it to a claim for not exceeding six millions of dollars.

**XII.** The respondent's theory is, that the words "shall be a first claim on the property" mean only a first claim over the common stockholders whenever at the end of all things the property shall come to be distributed. These words could upon that interpretation have effect only in a contingency so remote and unprecedented that it may be regarded as impossible—the contingency that this Railroad Company after exhibiting the symptoms of insolvency so as to be subjected to a foreclosure for nonpayment of interest, should produce enough by

sale of its property, to pay all debts and leave a surplus to be distributed. Is it to be supposed that men of business, possessing the absolute ownership of such property, intended to accept as a "preference" a claim which could have no theoretical application, unless the Company's property should be insufficient to pay all its debts; and no practical application unless after being wound up as insolvent this company should by the final processes of sequestration develop a surplus?

Has such a case ever occurred in the history of corporations?

Is it conceivable that the preferred certificate holders in reserving to themselves a special advantage and calling it a preference, should *uno flatu* destroy all its value by giving to the majority of common stockholders an unlimited right to create an indebtedness destructive of that preference?

That such a mistake might be made, and that the company might be ordered to be wound up as insolvent, when it really owned a surplus over all its debts, is possible; but that this is what the parties were contemplating and providing for, when, in the same sentence, they proceeded to deal with the company as a going concern, earning net profits, does not appear to be a just conclusion under the circumstances of this case.

Martin v. Wright, 6 Queen's Bench R., (51 English Common Law R.) 916.

In the case cited, the Court unanimously construed the defendant's agreement to guarantee a merchant's "*present or any future debt*" as extending to those debts only, which the other provisions of the guarantee showed the parties had in contemplation. Patteson, *J.*, said: "No doubt the words, 'his present or any future debt' are large, and might include all debts accruing in the course of the dealings between the parties; but that expression is

*limited by the subsequent words,* 'should he fail to pay at the expiration of the above credit,' which confine it to debts accruing on the sale of goods at two months' credit. The plaintiff could not on this guarantee have maintained an action in respect of a debt for money lent."

**XIII.** The language used in creating the preferred stock and in the certificate is "to be and *remain* a first claim on the property." At the time of its creation, and for many years, the preferred stock was the first claim, and what it was in its inception it was to *remain*, by both the language and spirit of the agreement. Nothing has taken place since to alter the priority of the lien for which a *continuing* existence was thus obtained.

**XIV.** It may be that the lien claimed by the appellants should be held to extend, only, to such property of the corporation as was transferred to it by the trustees under the amended trust agreement, and such further property as it has acquired by expenditures of its earnings and of the proceeds of the "*new*" mortgage bonds and other securities contemplated by that agreement, (fol. 92). The second mortgage bondholders admit that their mortgage covers only the equity of redemption in the property of the Springfield division, although executed in 1871, four years before the Springfield division mortgage (fol. 17). In like manner, the preferred stockholders may also admit, without prejudicing their claim in other respects, that their lien extends only to the property contemplated by the trust-agreement, subject to the indebtedness also contemplated by the trust-agreement.

**XV.** The Court below, while admitting that the indebtedness, to which the preferred stock is postponed in marshalling the liens against the property of the company, must be an indebtedness "*having a valid lien* against its property although created afterwards," nevertheless sustained the several demurrer of the Railway Company (2 Federal Reporter, 40). If the appellants are wrong in their claim to a priority over the lien of the second mortgage, certainly *as against the company itself*, in respect of the Springfield bonds which are not a lien on the company's property other than the Springfield branch, the preferred stockholders have a lien on the property *not* covered by the Springfield mortgage, next after the second mortgage. And, in any aspect of the case, the Court erred in sustaining the several demurrer of the Railway Company; for the preferred stockholders have, at the least, a valid claim upon its surplus assets after payment of its debts, superior to that of the common stockholders; and that preference should be declared in the foreclosure decree.

GROSVENOR PORTER LOWREY,
Counsel for Appellants.

PORTER, LOWREY, SOREN & STONE,
Appellants' Solicitors.

108-389

IN THE

# SUPREME COURT

OF THE UNITED STATES.

GEORGE HENRY WARREN, *et al.*,
*vs.*
WILLIAM KING, *et al.* } No. 268.

AN APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

## *BRIEF FOR APPELLEES.*

HOADLEY, JOHNSON & COLSTON,
HARRISON, HINES & MILLER,
*Sol. for William King and others.*

FRANK H. SMITH, PRINT., 16 E. WASHINGTON ST. INDIANAPOLIS.

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On the 17th of November, 1876, William King and others, holders ot Second Mortgage bonds, and Springfield Divison bonds, of the Ohio and Mississippi Railway Company, filed their bill in the court below for a foreclosure and for the appointment of a Receiver. On the 10th of August, 1877, Allen Campbell who was named as a defendant in the bill of William King, filed an original bill, as Trustee of the Second Mortgage, for foreclosure. These two original bills were afterwards (Jan-

uary 9, 1879,) consolidated. On the 4th of December, 1879, George Henry Warren and others, the appellants here, were admitted defendants to said consolidated cause, and filed their cross-bill. (Record, p. 19.) To this a demurrer was sustained, (Record, p. 45), the cross-bill was dismissed for want of equity, and from that ruling this appeal is prosecuted. The cross-complainants are the holders of shares of preferred stock of the Ohio and Mississippi Railway Company, and the object of the cross bill is to have these shares declared to be a lien on the property of the railroad company next after the first mortgage bonds. This claim is based upon a certain trust agreement entered into about 1858 and amended in 1867, at a time when the road was being reorganized, between the floating debt creditors and the stockholders. The Trustees, under this agreement, had purchased the Eastern Division of the road, extending from Cincinnati, Ohio, to Vincennes, upon a foreclosure, and had also acquired for the trust all of the stock and a portion of the bonds of the Western Division, extending from Vincennes to St. Louis. Under this trust agreement, the creditors of the old corporation were to receive preferred stock in the new company for their debts, and the stockholders of the old corporation were to have in exchange the common stock of the new. We extract from this trust agreement those parts that express this feature of the new organization:

"The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock twenty-three millions five hundred thousand dollars, which shall be issued and distributed as follows:

"To the persons or parties who shall be duly regis-

tered on the books of the trust as the owners of trustees' certificates, upon a day to be determined by the trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the city of New York, upon the surrender by the said owners and the cancellation of their several certificates, and on the terms following, namely:

"To the owners of preferred certificates so registered, or to their legal representatives, there shall be issued preferred stock of the corporation, full paid, for the amount of such preferred certificates, at the rate of one share of such preferred stock for every one hundred dollars of preferred certificates and scrip for fractional parts of such share. Interest in cash at the rate of seven per cent. per annum, to be paid upon preferred certificates from January 1, 1867, to the day designated by the trustees for conversion into stock, but such interest is not to be paid until said certificates are surrendered for conversion.

"It shall be declared upon the face of said preferred stock that it is to be and remain a first claim upon the property of the corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum upon the amount of said stock, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock of said corporation; and that whenever the net earnings of the corporation, which shall be applied in payment of interest on the preferred stock, and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the

preferred and common shares equally, share by share.

"To the owners of common certificates, registered as aforesaid, or to their legal representatives, there shall be issued full-paid common stock at the rate of one share for every one hundred dollars of common certificates surrendered, and scrip for fractional parts of such share.

"The scrip issued for fractional parts of shares of preferred and common stock shall be made convertible into shares of full-paid preferred or common stock respectively, when presented and surrendered for cancellation in sums not less than one hundred dollars, duly indorsed by the persons or parties to whom said scrip was issued, without the necessity of transfer on the books of the corporation; but said scrip shall not be entitled to interest or dividend until converted into full shares.

"It shall be made obligatory upon the new corporation to purchase and cancel such amount of common certificates as may be in excess of twenty million of dollars, such excess now being $226,604.44.

"The trustees are hereby authorized to sell and dispose of, for the benefit of the trust, such amount of preferred certificates as is yet unissued within the aggregate sum of three million five hundred thousand dollars, such amount now being $146,816,18.

"The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees, to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on said property at or before the maturity thereof.

"Whenever the new corporation may deem it important to the interest to connect their road with Louisville, they are hereby authorized to increase the amount of preferred stock ten thousand dollars per mile for each mile of such connecting line; and also are authorized to provide in the mortgage for six million dollars above contemplated, that the same may be increased by fifteen thousand dollars per mile for each mile of such connecting line to Louisville to be used for perfecting such connection. * * *

"There shall be issued to the trustees, in full compensation for their services and amounts due for their personal expenses in the execution of the trust, an amount of preferred certificates equal to one half of one per cent. upon the aggregate amount of certificates issued under the trust agreement, to be apportioned by the trustees according to their respective terms of service."

The claim of the preferred stockholders' as stated in the brief of their counsel filed in the court below (we have not seen their brief on appeal), is: "That their stock gives them a specific and continuing lien and security and first claim upon the property of the corporation, next after, and subject only to, the indebtedness existing * * * under the mortgage of December 24, 1867, not exceeding in all $6,800,000."

This claim is based, we are told, "primarily and directly on the terms of their certificate, * * * and is sustained by the conceded facts connected with the trust of 1858, in which the present corporation had its legal origin."

These certificates of stock, which Warren and his associates hold, read as follows:

# OHIO & MISSISSIPPI RAILWAY COMPANY,

REORGANIZED AND CONSOLIDATED 1867.

PREFERRED STOCK.

This is to certify, that ..... is entitled to ..... shares of the preferred capital stock of the Ohio & Mississippi Railway Company, of one hundred dollars each, transferrable only on the books of said company in the city of New York, in person or by attorney, on the surrender of this certificate.

The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock, and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common shares equally, share by share.

This certificate is not valid until countersigned by the Register of Transfers.

New York, ....., 186 .

——— ———, *Secretary*, ——— ———. *President.*

Countersigned this ... day of ..... ....., 186 .

Union Trust Co., of N. Y.

JAS. OGILVIE, *Register.*

If there is anything in this certificate to indicate a purpose to give the holder of it any priority over creditors of the company, either as to the principal of his stock or any annual payment thereon, we fail to find it. Words must be added before any suggestion of such a purpose can be discerned. The lengthy and able argument of the opposing counsel is expended in an effort to substitute for the word "indebtedness" the words "the first mortgage bonds of the company." We think the preference intended to be given to the holders of these certificates was, in kind, that and that only which usually attaches to what is denominated "preferred stock," viz: a preference over the common stock. The words used in the certificate, read in their usual sense, convey this meaning; nothing needs to be added or taken away. The holders of these shares, as well as of the common shares, are stockholders—proprietors. As such their claims are subject to the corporate indebtedness—all of it, whether secured or unsecured. If, on a dissolution of the corporation, one was called upon to name the place of the stockholder in the schedule of distribution, he would say, in the language of the certificate (next) "after its indebtedness." If certain shares are to be preferred over other shares, how could it be more aptly expressed than to say that the preferred shares shall be a "first claim upon the property of the corporation after its indebtedness?" By this language the preferred stockholder is assigned a place between the creditors and the owners of common shares.

If we examine the terms of the certificate as to interesst, or dividends, there, too, the preference is plainly over the common stock, and nothing else. The "interest" is not payable absolutely, but only out of "net earnings." The same words are used to describe the fund out of which "dividends" are to be paid on the common stock. But in dividing these "net earn-

ings," seven per cent. per annum must be given to the preferred stock "*before any pagment of dividend upon the common stock.*" There is here no fixed interest charge. The preferred stockholder is not made a "preferred creditor," nor a *creditor* at all as to this "interest." Whenever there is a fund out of which the directory may properly declare a dividend on common stock, seven per cent. per annum of that fund shall first be paid on the preferred shares; then, if there is enough, a like per cent. on the common shares, and then, if there is still a surplus, it shall be divided equally on both classes of stock. In other words, the control of the directory over the earnings of the company is not limited at all by the provision as to "interest" on the preferred stock, except that *before* they pay any dividend on common stock they must pay seven per cent. per annum on the preferential shares. All just debts of the company, whether for interest on borrowed money, or for operating expenses, have, in equity, to be paid before anything can go to the stock—before any "net earnings" can be ascertained. The power of the directory to incur debts for any purpose within the corporate powers, and to pay such debts out of earnings, is left intact. It is their duty to pay all matured obligations of the company before the balance is struck and the "net earnings" declared.

We do not understand, and doubtless the fault is with our perception, the position of our adversaries, as to their claim for "interest."

Do they claim the payment of seven per cent. per annum absolutely, without reference to "net earnings?" Can they go to the body of the property for their interest, as the bondholders may? Such seems to be the claim, for we read in their printed argument that "the right of the preferred stockholder was to be, as to principal *and interest*, next after that of the holders of the

mortgage indebtedness." And yet, the learned counsel tell us that they base their claim "primarily and directly on the *terms* of their certificate," wherein the only provision as to "interest" reads: "The holder thereof shall be entitled to receive *from the net earnings* of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, *before* any payment of dividend upon the common stock," etc.

The meaning plainly is, that, out of any fund that is applicable to dividends on the stock shares of the company, the holder of these shares shall have seven per cent. per annum *before* anything is divided on the common shares. He is preferred—*put before*, the common stock—but where is there so much as the faintest suggestion of any purpose to put him before any class of creditors? The fund from which this seven per cent. is to be paid on preferred stock is the *same fund*, derived and ascertained in the same way, out of which the seven per cent. is next to go to the common stock. If there is an excess of it, the common stock gets it up to seven per cent. There is no provision for the payment of interest to the preferred stockholders, *then* of creditors, and *then* of any balance to common stock. It is plain that the creditor is to be first paid, before the net earnings are stated or divided to any class of stockholders. The body of the common stock stands behind these preferred shares, and can not get to a dividend until seven per cent. is paid to this favored class.

We have thus far considered the claim of the petitioners, as founded upon the terms of the stock certificates which they hold. It is noticeable that, while this claim is somewhat boldly and strongly stated, it is very little expanded in argument. The argument is expended mainly in an attempt to show that the construc-

tion contended for is sustained by the facts connected with the trust of 1858.

We turn now to consider how far these facts tend to support this construction, only remarking in the outset that, if the certificate contains no uncertain phrases or ambiguities, the consideration of these facts is of minor importance. The conditions of the certificates of preferred stock are copied literally from the amendments to the trust agreement of September 10, 1867. If we have correctly understood the argument of the petitioners' counsel upon this branch of the case, it is based wholly upon the assumption that the holders of these preferred shares, before accepting them, and under the trust agreement, occupied toward the corporate property such a position of advantage as to make it unlikely that they would consent to exchange this position for that of mere stockholders, with a preference only over the common stock. Now, we think it can be made very apparent, that the holders of the preferred certificates, under the trust agreement, intended to become corporators—proprietors, in the new corporation which was to be formed, and to which the entire trust property was to be conveyed. It seems to be assumed for the petitioners, that all of the holders of these preferred certificates held liens upon the property of the old corporation. This we do not understand to be true. On page 8, of the petition of Warren and others to be admitted defendants, in the seventh paragraph, it is alleged, in describing the objects of the trust, that it was "for the purpose of providing for and protecting claims of judgment creditors, and other persons holding liens on the property and franchises of said company, and also holders of certain unliquidated demands against it, and also the interests of the stockholders of said company."

The original trust agreement is not before the Court, but, if we understand the averments of the petition,

preferred certificates were issued, as well to the holders of these unliquidated demands as to judgment creditors or others holding liens, and common certificates to the stockholders of the old company. We further learn, both from the averments of the petition and from the amendments already referred to, "that it was the intention of all parties interested in the trust to form a corporation, to which the entire property of the trust may be transferred, in pursuance of the fifteenth article of said agreement." See amendments, September 8. 1867, page 36 of the Record.

The corporators of this company, which was thus contemplated, were to be the persons interested in the trust. The intention of these creditors to lay aside their character as such, and to become proprietors in the new corporation, is plainly expressed. It must also be recollected, in considering the question whether these creditors would be likely to release their then advantages as such, that there were then existing large mortgage debts upon the property of the trust, to which all of these judgments and other liens were subject. It does not seem to us unlikely that judgment creditors of a corporation, whose property was heavily mortgaged, and which had broken down, so as to render a re-organization necessary, would consent to exchange the hard conditions of junior judgment creditors, or of creditors having no liens, for preferred stock in a new corporation. We do not know any more helpless or hopeless position that a creditor can occupy, than to be the holder of a judgment lien for a few hundred or a few thousand dollars upon the property of a corporation which is mortgaged for millions. Looking at the enterprise as it stood at the date of the trust agreement and the amendments, it seems to us that the exchange of position which was made by these creditors was manifestly for their advantage. If the enterprise could not be

made to pay interest on its mortgage debts and 7 per cent. on the preferred stock, then it is very clear that there was no hope of these separate judgment or unsecured creditors realizing their debts out of the corporate property. If it had capacities to make such earnings, then their preferred stock gave them an improved security, while in their new relation as proprietors, of a privileged class, they secured to themselves the benefits of a *full* participation in the earnings of the company. If, as counsel argue, it was the intention of these creditors to maintain the relation of creditors to the new enterprise, and to make their debt, principal and interest, a fixed charge upon the property and earnings of the new company, why was it not done by bond and mortgage?

We notice again, that the amount of the preferred stock was not fixed by the amount of the preferred certificates. An excess of $146,800 was expressly authorized to be sold by the trustees for the benefit of the trust, and in addition they, or the corporation after the organization, were authorized to issue $10,000 per mile of the Louisville branch, for the purpose of aiding in its construction.

By another provision of the amended articles, the new corporation was required to purchase and cancel all of the common certificates in excess of $20,000,000, the allowed capital stock. This excess is recited to be, then, something more than a quarter of a million.

If we suppose the road to have been operated by the trustees under the trust agreement until now, the certificate holders, preferred and common, being in the meantime the proprietors or owners of the property, certainly any debts or obligations contracted by the trustees, in the management of the property, within their powers, would have had priority over the claims of all of the proprietors. These debts would have been the

debts of the certificate holders, against which it would have been absurd for them to assert a priority. In providing for the transfer of the property to the new corporation, which they organized, and of which they became members, with the right to full participation in all earnings, is it unreasonable to suppose that they intended their proprietary interest to continue subject to any debts rightfully contracted by the directory of the company, elected by themselves to control and manage their own property? It seems to us unreasonable to suppose, that the helpless holders of these numerous liens, and of unsecured debts against the company, should have intended to continue to be creditors, holding fixed charges for principal and interest, and at the same time to become proprietors by virtue of the very same investment. It is not an unusual, but a very familiar plan of reorganization, to change the fixed charges of creditors into the contingent rights of stockholders.

These agreements show that, in the opinion of the persons interested, it was necessary to create a first mortgage debt of $6,800,000. We do not wonder that they hesitated to add three millions and a half more.

What other course was open to these creditors than to buy in the property subject to the existing mortgages and then to realize their debts, if they could, by operating the property as a railroad, taking the chances of earning enough to pay the annual interest upon their investments? If there were any facts showing that by the usual processes of courts of law or equity the holders of these liens against the railroad could have speedily or certainly realized their debts, there might be some force in the argument that they had surrendered some advantage; but it is apparent that no such remedy was possible. To buy in the property themselves, by a combination, was the only course open to them.

They did this, taking the common stockholder into partnership with them in the purchase, but deferring his stock to theirs.

So far, then, from finding in this trust agreement, or in any facts connected with the reorganization, anything that tends to show that these preferred certificate holders intended to maintain the relation of creditors to the company, we think the contrary is most obvious.

We do not believe that the law will authorize the same persons to stand, by virtue of the same investment, as proprietors of an enterprise, conducting it by themselves, or others, taking all its gains, if successful, and in case of failure or disaster to become preferred creditors for their investment, against those who have contracted with them as proprietors. The court will assume that these parties intended to occupy a position to the new corporation such as the law and common honesty will sanction.

Turning again to the certificates and the law authorizing preferred stock, we find that the holder of such a certificate is a stockholder in as full and ample a sense as the holder of a common share. He may become a member of its directory, or be its president; he may, by his vote, either as stockholder or director, take a full part in the management of the company. If it is suggested that under the law a bondholder may do this, we answer that this is a special statutory privilege, and does not grow out of his relation as bondholder. By the statutes of Indiana, 1st Davis, sec. 5, page 730, authorizing corporations to confer a voting power upon their bonds, it is provided, "that such voting power shall not subject the holder to any assessment made by said company, or to any liability for its debts, or entitle any holder thereof to dividends."

The right of a stockholder to vote inheres in the relation of stockholder, though it may be regulated by

statute. After all, however, that which most clearly discriminates the proprietor from the creditor is the right to a full participation, according to the amount of his investment, in the profits of the enterprise. The shareholders who bring this petition expressly stipulated for such participation. These shares are included in the capital stock of the corporation, as specified in its articles of incorporation. No promise or provision is made for the repayment of it as a debt. If it is a part of the capital stock of the corporation, it could not be repaid to the stockholder before the payment of all the debts of the company. Section 7 of the law of Indiana establishing provisions respecting corporations (1st Davis, page 370), is as follows:

"If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders before the payment of all the debts of the company, all the stockholders of such company shall be jointly and severally liable for the payment of such debts."

We believe there are similar provisions in the statutes of the other states through which this road runs. Any contract of the corporation with a stockholder to refund or repay his stock before the payment of the debts of the company would be in direct contravention of this statute.

Both in the certificate of incorporation, exhibit "A," with the petition, and in the articles of consolidation, exhibit "B," these preferred shares are expressly declared to be a part of the capital stock of the corporation; and yet the demand here is, that it shall be repaid to the holders of these shares in preference to the debts of the corporation.

The authority to issue preferred stock is conferred by the general railroad law of Indiana. Section 20, 1st Davis, p. 706, expressly defines and limits the preference

that may be given, to "a priority over the remaining stock of such company in the payment of dividends."

Section 5, of the act of March 3, 1865, *id.*, page 730, authorizes the reorganized companies, to which that act refers, "to make preferred stock—make and establish a preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same in such manner and to such extent as such corporation may deem expedient."

Now, construing these sections together, and, in connection with that section of the general statute respecting corporations, which prohibits the repayment of any capital stock until the debts are all paid, is it not clear that section 5 relates to an allowed preference between the two classes of stock which are authorized, viz: common and preferred, and not to a preference of the preferred stock over the general creditors of the company? When it is said, in section 5, that a company may make preferred stock, section 20, above cited, defines that preference; and the power to secure "the same," evidently refers to the allowed preference, which is of stock over stock. There is no hint anywhere of a legislative purpose to permit a proprietor or shareholder to have a preference over creditors.

We will consider now some of the reported cases bearing upon this question:

The case of *Skiddy et al* v. *Atlantic, Mississippi and Ohio R. R. Co.*, cited by counsel for petitioners, and of which a pamphlet copy has been kindly furnished us, is distinguishable in many particulars from the case at bar.

The law of Virginia authorized the railroad company in case any part of its capital stock should be unsubscribed, and it was necessary to obtain the amount thereof for the completion of the work, to borrow the whole or any part of such unsubscribed capital stock, and

make the same convertible into stock of the company, at the option of the lender. There being a large amount of unsubscribed stock, the directors, after reciting the necessity of realizing the unsubscribed amount of their capital stock, and their inability to do it without some inducement by way of guarantee, resolved, "that to any and all persons subscribing any portion of this unsubscribed capital stock, interest thereon, at the rate of six per cent per annum will be guaranteed and paid semi-annually, at the office of the company. * * * The interest thus accruing shall be regarded as a liability of the company next in grade to the second mortgage bonds, and shall take precedence of any and all indebtedness subsequent to this date, and will be so guaranteed, preferred and paid, until the company shall declare and pay consecutively two yearly dividends of at least six per centum per annum." It was provided that after such dividends had been paid, these shareholders might be required to release this guarantee and liability by the surrender of their certificates, and that in lieu thereof, certificates of common stock should be issued to them; or, that they might receive in payment thereof the bonds of the company. Stewart subscribed for some of this stock, taking certificates in which were incorporated, by reference, the resolutions from which we have made the above extracts.

In subsequent mortgages made by the company, a preference was expressly reserved in favor of the interest that might accrue upon this stock.

Upon this case we remark:

1. That the intention of the company to make this stock, so called, a liability of the company, and to assign it a place next after the second mortgage bonds, is very clearly *expressed*, and not, as in the case at bar, rested upon inferences.

2. Under the authority of the law of Virginia, to

which reference is made in the petition of Stewart, it seems to have been assumed that the method there resorted to was in effect a borrowing of money on the unsubscribed stock.

3. A time and method for the repayment of this so-called stock is definitely fixed and provided for. The holder of it could be required to exchange it for common stock, or for the bonds of the company, upon the terms stated. He did not become a permanent member of the corporation, with a right to a full participation in all its earnings, during the corporate existence. In the opinion of the court, it is assumed that the method resorted to for the borrowing of money was lawful, and that the holders of these shares became creditors of the company. Assuming this, the court held that, as between the parties, an equitable lien existed in favor of these certificates. It will, therefore, be noticed that upon the question of the construction of the contract before this court no light is obtained from that authority. The language used there was explicit. There could be no doubt as to the intention of the parties.

The case of *St. John* v. *Erie Railroad Company*, heard before Blatchford, Justice, and reported in 10 Blatchford, 271, and afterwards affirmed by the Supreme Court of the United States on appeal (22 Wallace, 136), is a very strong if not a decisive authority in our favor. In that case the facts show that the Erie Railroad Company was reorganized, and the unsecured and judgment creditors of the old company agreed to receive the preferred stock of the new company.

We are furnished here with another case where this class of creditors did just that thing which counsel argue can not reasonably be imputed to the same class of creditors in the case at bar. The preferred shares in that case contain this provision: "Said stock shall be entitled to preferred dividends out of the net earnings,

if earned in the current year, but not otherwise, not to exceed seven per cent. per annum, payable semi-annually, after payment of mortgage interest of said company in full." This provision was expressly authorized by a legislative act, which also secured to the holders of these preferred certificates a right to vote in all corporate meetings, the same as the holders of common stock. The question presented to the court was whether the holders of these preferred shares were entitled to seven per cent. annually, before any of the earnings were applied to the payment of interest on bonds afterwards issued by the company, or to the payment of rental upon roads thereafter leased. The argument made in their behalf was strikingly similar to that addressed to the court here. We quote:

"It is contended on the part of the plaintiff that, as the unsecured bondholders to whom the preferred stock was issued stood, when the contract was made, next in order, as creditors, to the holders of the mortgage bonds, they became entitled to occupy the same relative position as holders of preferred stock, and to receive their dividends on such stock out of the earnings, before the payment of interest on obligations incurred after the issuing of such stock, and of rents of roads, the leases of which were taken after the issuing of such stock. * * * * That the preferred stock is only a new form of security for the debts, in exchange for which it was issued, holding the same place and entitled to be paid the same interest: * * * * that the holders of the preferred stock are not subject to the contingencies of new loans and new leases and extended enterprises."

In the course of the opinion, Judge Blatchford says: "The priority of the preferred dividends over anything depends wholly on the meaning of the word 'preferred.' Now what is it that is entitled to preferred dividends? It is preferred *stock*. But such stock is not declared to

be anything more than stock entitled to preferred dividends. In that sense only is its character as preferred stock defined by the contract. What it is entitled to is dividends and only dividends, and they are of a defined and special character. * * * It has no privilege or priority by reason of being preferred stock, except in reference to stock that is not so preferred—that is common stock. In reference to such common stock the preferred stock is entitled to its specified preferential dividends, and is not entitled to anything else in reference to anything.

"The former holders of the unsecured bonds of the old company, by taking the preferred stock in exchange for their bonds, abandoned their position as creditors, *and became merely stockholders in the new company, as against these existing, and all future creditors of the new company.* They acquired the same right to vote as the holders of common stock. In the absence of any expressed intention to the contrary, it would be very unreasonable to suppose that the general power of the defendants to take leases of roads, and pay the rents on them, and to borrow money and issue bonds therefor, and pay the interest on such bonds, would have been subordinated by the legislature, or by themselves, to the rights of any class of their stockholders; *and equally unreasonable to suppose that the claims of creditors would have been postponed to those of stockholders.*"

In the Supreme Court Mr. Eaton, for the appellant, repeats the argument urged below, that it was "unreasonable" to suppose that they, the preferred stockholders, who could have obtained judgments against the company on their debts, and thus have secured liens second only to the mortgages, would consent to give the company power to create debts which should take precedence of their stock. He argued further, as it is argued here, that the language of his certificate conformed to the probabilities indicated by surrounding circum-

stances. His claim was, that the net earnings were pledged to the payment of dividends upon the preferred shares.

Mr. Justice Swayne, who delivered the opinion of the court, says: "The original takers of the preferred stock were *creditors. They abandoned that position and became stockholders.* They thereupon ceased to be the former and can only be regarded as the latter. They surrendered their debts and received in return stock of the same amount, which gave them a chance for annual dividends of seven per cent, and a voice by voting in the choice of those by whom the affairs of the company were to be administered. What they were to receive was not interest, but dividends, and they were to receive them in priority to the holders of the common stock."

In this case it is noticeable that the amount of dividends which the preferred stock might receive was absolutely limited to seven per cent; the holders of preferred stock had no right to a full participation, as here, in all the earnings.

Continuing, Judge Swayne says:

"The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument, and there is nothing from which the intent to continue that relation any longer can be inferred. If the mortgages were foreclosed and there were a surplus left insufficient to satisfy the general creditors, it is quite clear that the holders of the preferred stock would have no right to share in the fund."

Without quoting further from this case, we solicit a careful examination of it.

In *Lockhart* v. *Alstyne*, 31 Mich., 76, the question arose upon an indorsement on certificates of preferred shares, in these words: "Five per cent semi-annual dividends guaranteed from September 1, 1872." The court

held that this could not be construed to be an absolute promise on the part of the corporation to pay ten per cent. annually upon the preferred shares; that the holder could only claim the guaranteed dividends when there were funds of the company from which dividends might properly be declared. In commenting upon the anomalous relation which the holder of these shares would sustain to the corporation if his contract were construed to bind the company to these annual payments, without reference to profits, the court says: "It is not a mere preference that is given to the holders under this construction; it is a preference, with a perpetual promise to pay the largest interest permitted by law on the sum invested by them, profits or no profits; so that the holders have at the same time all the advantages of stockholders and of creditors, while their associates are postponed as stockholders, and considered as representing the debtor corportion, they are deprived by the very contract itself of any reasonable probability of restoring the standing and strength of the corporation." Again: "To the success of the corporation it is important, if not essential, that there should be substantial harmony of interests among the corporators. Such harmony may exist among common and preference stockholders if the preference extends only to the division of profits; but, if it goes farther, it disappears and antagonism necessarily comes in."

In *Williston* v. *Michigan Southern etc., R. R. Co.*, 13 Allen 400, the action was upon what was called guaranteed capital stock. The court held, that the holder of such certificate could not maintain an action against the corporation for a failure to pay and declare dividends as guaranteed.

In the course of the discussion, Foster, Justice, says:

"The plaintiff, as a stockholder, is entitled to participate in the management of the company, and the corpo-

rate debts are created by officers and agents, in the election of whom each of his shares has a vote. The union of a right to receive a distributive share of the profits, or net earnings, with the right to enforce a payment of such percentage as a debt, would be unusual, if not incongruous. Each share represents a fixed and proportionate interest in the capital of the company, the intrinsic value of which consists in that of the railroad, its appendages, franchises and personal property, over and above the liabilities of the corporation. To suppose such a relation to be coupled with that of an ordinary contract to pay interest on a debt, *and that the same contribution to capital constitutes at once a member and a creditor of the company, would destroy all distinction between capital stock and corporate indebtedness.*"

In the oral argument, it was conceded that very little stress could be laid upon the use of the word "interest" in the certificates of the petitioners. In the printed argument, a good deal of stress seems to be laid upon this word; and yet, it is conceded by counsel that the use of the word "dividend" or "interest" to characterize or describe a particular payment, does not necessarily make it one or the other. The court will look at the relation of the party, to whom the payment is to be made, to the corporation. If his relation is that of a creditor, and not a proprietor, then this annual payment, whatever it be called, is interest; but, if his relation be that of a proprietor or stockholder, then the annual payment, whatever it may be called, is a dividend.

In the case of *Burt* v. *Rattle*, 31 Ohio St., 116, the word "dividend" was construed to mean interest, because, though the relation of the party was nominally that of stockholder to the corporation, his true relation was that of a creditor. In that case the preferred stockholder, as he was described in the law, was,

in fact, no stockholder at all. The law authorizing the issuance of what was there called "preferred stock," provided that the holder of such stock should have no voice in the management of the company and no participation in the earnings, beyond the agreed interest or dividend, and should come under no liability for its debts. And as the right to participate in the management of the corporation, to share to the full in its profits, and the liability, under the law of Ohio, to be answerable for its debts, are characteristic of the relation of stockholder, the court held that these obligations, though described as stock, were really evidences of indebtedness, and that the annual payments, though described as "dividends," were, in fact, "interest."

In that case, a mortgage to secure the money advanced upon the shares was taken.

"The court says: "The majority of us concur with the court below in holding that this transaction between the corporation and the so-called 'preferred stockholders' was, in fact and in law, a loaning of money upon mortgage security, and not the creation of additional members of the corporation. * * * The act denies them every element and attribute of ownership or actual membership. They have no right to vote or to take any part in the possession or control of the concern. They gain nothing by its success and lose nothing by its failure. They have no participation in either the profits or losses. They are strangers to the company, have no interest in it, and look alone to its promise and its mortgage for remuneration."

And again: "Interest is not changed into a dividend by calling it a dividend. Nothing is more common in the construction of statutes and contracts, than for the

court to correct such self-evident misnomers by supplying the proper words."

And, to use the language of the court, in *Corcoran & Riggs* v. *Powers et al.*, 6 Ohio St., 19, "The question in such case is not what did the parties call it, but what do the facts and circumstances *require the court to call it*."

In *McGregor* v. *The Home Ins. Co.*, 33 N. J. Eq., 181, the question arose between preferred and common stockholders as to the division of the net capital, the corporation being in liquidation. The Chancellor held that, in the absence of an express provision giving the preferred shares a priority over the common shares in the division of the capital, the preference only extended to dividends. The law of New Jersey was as follows: "The surplus funds, if any, after payment of creditors and costs and expenses, and the preferred stockholders, may be divided and paid to the general stockholders proportionally according to their respective shares." Under this statute it was held that the preference extended to the distribution of the assets remaining after the payment of corporate debts. The Chancellor states this to be the rule: "I think it must be admitted according to the general current of authority that preferred stock, in the absence of an express stipulation or direction to the contrary, simply gives the holder a right of preference in the division of profits, and not in the distribution of capital. And even when it is issued under an agreement or guarantee that a dividend of a fixed sum shall be paid on it annually, such dividend can only be paid out of net earnings or profits; and if no profits are made, no dividends can be paid."

In Green's Brice's Ultra Vires (p. 146), it is said, speaking of the holders of preferred shares:

"But these shareholders are not creditors, not even as to dividends in arrear, and therefore in a winding up they can rank only *pari passu* with the other members."

To the same effect, Field on Corporations, sec. 120.

The case of *Taft* v. *Hartford, etc., R. R. Co.*, 8 R. I., 310, is also instructive. The certificates in that case stipulated for "preferred and guaranteed dividends, at the rate of ten per cent. per annum, payable semi-annually, before any dividends shall be paid on other stock of the company." In the course of the opinion, Bradley C. J., says:

"The question presented is, what is the meaning and engagement of the company as expressed in these words? The relations between these parties are obviously those between shareholders and the corporation. They are not on the face of the contract, those of creditor and debtor. * * A holder of stock retains his right to share in the management of the corporation and to participate in it profits. He is not its creditor by virtue of this relation. If he is to be constituted its creditor, there are well known modes and words by which that relation can be expressed. If, instead of adopting them, he receives a certificate of stock, and then claims to be both its creditor and stockholder by virtue of the same contract, the burden is upon him to show that such anomalous relation exists. The presumptions of law and the usual course of business are against him."

We conclude that, whether judged by the terms of the certificate which they hold, or by these terms aided by all the circumstances under which the certificate came into being, it is clear that the holders of these shares became and are, in the fullest sense of the word, stockholders; that they surrendered, absolutely and forever,

all claim to stand as creditors; that the preference which they secured to themselves was a *preference as stockholders over stockholders.*

And secondly, that, if they had attempted to preserve the double relation of creditor and stockholder, the courts would not give effect to such a contract.

HOADLEY, JOHNSON & COLSTON,
HARRISON, HINES & MILLER,
*Sol. for William King and others.*

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

Vol. 38

SUPREME COURT U.S.
APR 13 1939
JAMES W. McKENNEY, CLERK

# SUPREME COURT OF THE UNITED STATES.

GEORGE HENRY WARREN ET AL.,
Appellants,

AGAINST

WILLIAM KING, ALLAN CAMPBELL and others,
Respondents.

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA, OVERRULING A DEMURRER BY RESPONDENTS TO A CROSS BILL OF APPELLANTS.

## Statement.

The Ohio & Mississippi Railway Company, a corporation of Indiana, Ohio and Illinois, in 1867, made its mortgage to Allan Campbell and J. N. F. Odell and the survivor in trust to secure certain bonds amounting to six millions of dollars, afterwards on building the Louisville branch, pursuant to provisions in the mortgage, increased to six million eight hundred thousand dollars.

In 1871 the said railway company made its second mortgage to the same trustees to secure certain bonds amounting to four millions of dollars.

In November, 1876, William King, John W. Garret and others as holders of bonds of the said second mortgage filed their bill in the United States Circuit Court for the District of Indiana against the Ohio and Misissippi Railroad Company, Allan Camp-

bell as trustee in said second mortgage and others to foreclose said second mortgage.

The defendant Campbell answered that bill and also filed a cross-bill to foreclose the same second mortgage and also filed a bill to foreclose the first mortgage.

A receiver was appointed in these causes and on January 9th, 1879, they were consolidated (see Record, pp. 17, 18).

In December, 1879, George H. Warren and others were made parties defendant to the said consolidated cause and thereupon filed their cross bill to which all the other parties to said consolidated cause demurred for want of equity.

Record, pp. 19, *et seq.*

The cross bill alleges that the complainants are preferred stockholders. That the receiver has been paying interest on second mortgage bonds in preference to and while he has paid no interest or dividends on such preferred stock and prays an adjudication that the preferred stock is entitled to payment in priority over the second mortgage bonds.

The cross bill also alleges the purchase by the Railway Company of a branch road, known as the Springfield Branch, and the issue of bonds secured by a mortgage which is a first mortgage on that branch, and a third mortgage on the Main Line road.

The demurrer was sustained in the Court below and the complainants in the cross-bill appealed.

The record presents possibly two questions:

1st. Have the perferred stockholders a right in or lien on the road, or its income superior to that of the second mortgage bondholders; and

2d. Was the purchase of the Springfield branch by the Railway Company void as *ultra vires* so as to make its mortgage to secure the bonds issued for that purchase likewise void.

## POINTS.

**First.** The second mortgage is a lien on the road and income superior to that of the preferred stock.

In the nomenclature of corporations and corporate securities, especially of railroad corporations and securities, the words "stock" and "stockholders," and "bonds" and "bondholders," and "preferred stock" and "preferred stockholder," have acquired definite and precise meanings.

"Stock" means the capital invested in and at the risk of the enterprise. "Bonds" evidence money loaned to the corporation, payment of which is deemed to be secured by the property in which the capital is invested.

"Preferred stock" means a class of stock to which certain privileges or rights are given over other stock.

Such language as is used in 2 Redfield, 598, cited by appellant on page 13 of his brief, to the effect that preferred stock is a form of mortgage, throws no light on the subject. It is difficult to select a more indefinite and peculiar term than that of "mortgage." See attempted definition thereof in 1 Jones on Mortgages, § 16.

If considered in reference to common stock, the statement that a preferred stock is a form of mortgage is well enough. Even in that respect, however, it is a form peculiar and in all but one feature essentially different from every other mortgage.

There is really but a single question in this case, and that is, what is the meaning of the words "after its indebtedness."

The appellant founds his argument upon the idea that the preferred stockholders had a lien upon the property of the old corporations which was of value, and in the surrender of which they made a concession. There is no proof of such fact and there is no basis for its inference. What some of the preferred stockholders had was a lien upon property subject to

the lien of mortgages which were being foreclosed. Apparently the property was insufficient to pay the first mortgages, and had to be nursed and cared for. This is inferrable from the fact that the trust agreement was made in 1858, and that the road continued to be run by Receivers, and the sale was postponed until 1867, when the final amendments to the trust agreements were made. This agreement contemplated the formation of a new corporation and provided for an interest therein, as stockholders, of all persons having any interest other than the mortgage bondholders.

That the lien of these preferred stockholders, theretofore existing, was regarded as of no value, is apparent from the fact that they all took on equal terms in the new corporation. Their several liens, such as they were, must of course have had varied priorities. Yet they all took preferred stock on equal terms.

It must also be remarked that a portion of this prior stock was issued for claims which were in no sense any lien whatever. Some of it was given to trustees as compensation for their services, and some of it was sold in the open market precisely the same as stock for a wholly new enterprise. See Exhibit C.

The term "after its indebtedness" was used in reference to a corporation about to be formed, and with reference to the fact that the new corporation would necessarily in the conduct of its affairs incur indebtedness and would need credit. The term was also used with entire knowledge of the fact of the mortgage indebtedness which was immediately to be placed upon the new road.

If, as is claimed, it had been the intention of all parties to make this preferred stock a claim second only to the mortgage indebtedness and superior to that of all other indebtedness which the company might afterwards assume or create, it must be confessed that the langaage is the most inapt for that purpose that can be conceived. If the purpose

had existed definitely and clearly, as is claimed, surely the able lawyers who advised the reorganization of that railroad, would have used terms as to which there could be no doubt, and not terms whose nature and primary meaning would be *any* indebtedness, whether mortgage or otherwise.

Beyond this, we have the fact of cotemporary construction. In 1871 the second mortgage was placed on this road. By its terms, it is expressed to be subject to the first consolidated mortgage, and, as the appellants confess, that construction would exclude the idea that it is subject to anything else. The preferred stockholders acquiesced in the placing of that mortgage. They made no sign, at least, of opposition; and a four year's acquiescence should certainly estop them from action now, when the second mortgage bonds have become distributed in the hands of an infinite number of *bona fide* holders.×

Another thing which would seem to make this construction clear, is that the preferred stock in itself is in no ordinary sense an indebtedness. It is an indebtedness only in the sense that common stock, or any stock, is an indebtedness. It is never to be paid unless upon a dissolution of the corporation and a distribution of its effects. The interest on it is never to be paid, and is not an obligation unless net profits for that purpose are earned. An interest of this character, in the natural order of events, certainly should be inferior to indebtedness of a corporation, which is payable at all events.

Nor can any inference unfavorable to our construction be drawn from the fact that the seven per cent. upon the preferred stock is called interest, rather than dividend. Things are not changed by words. What it is is clear enough. It is *dividend*. It is not payable as interest. It is payable only out of net profits, and may be called interest only when contrasted with the dividends upon the common stock, which can be paid only after the interest or dividend upon the preferred stock is paid.

× Kent v Quicksilver Mining Co. 78 N.Y. 159

The case of St. John vs. The Erie Railroad, 10 Blatch., 271, would seem to be directly in point, and it has been affirmed in this Court.

We submit that the judgment below was right, and should be affirmed.

WHEELER H. PECKHAM,
Counsel for Allan Campbell, Appellee.

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108-401

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

IN THE MATTER

OF

The Petition of the DEVOE MANUFACTURING COMPANY, a citizen of the State of New York, for a Writ of Prohibition in the United States District Court for the District of New Jersey, proceeding as a Court of Admiralty.

Your petitioner respectfully shows:

FIRST. That the Devoe Manufacturing Company is a corporation duly organized under the Laws of the State of New York, and is a citizen of the State of New York, and is and was at the times hereinafter mentioned the owner of the tugboat *F. W. Devoe;* that on or about the 25th day of April, 1882, one Johnson Hall filed his libel *in personam* in the District Court of the United States for the District of New Jersey sitting as a Court of Admiralty, against the said Devoe Manufacturing Company, alleging that he was the owner of the canal-boat *T. W. Griffin* and that a collision had occurred at Newton Creek, in the East River, between the said canal-boat and a lighter in tow of the tug *F. W. Devoe*, and claiming damages for said collision in the sum of four hundred and sixty dollars; that thereafter, and on or about the 20th day of October, 1882, process was issued by the said District Court for the District of New Jersey, to the Marshal of the District of New Jersey, commanding him to cite the said respondent if said respondent should be found in said district, and if it could not be there found, to attach its goods and chattels within the said district, and thereupon and on the

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27th day of October, the said Marshal, acting under said process, seized the tug *F. W. Devoe*, and on November 11, 1882, the said Marshal made return to the said Court, that in pursuance of the said writ he had attached the tug-boat *F. W. Devoe*, as the property of the De voe Manufacturing Company, within the said district.

SECOND. And your petitioner further shows, that at the time of the said seizure by the said Marshal, the said tug-boat *F. W. Devoe* was afloat in that portion of the waters of the State of New York which is known as the Kill von Kull, between Staten Island and New Jersey, and was made fast at the end of a dock at Bayonne, New Jersey, at least three hundred feet below high water mark, and nearly the same distance below low water mark in said Kill von Kull, and about half a mile from the entrance of the said Kill into the Bay of New York.

THIRD. And your petitioner further shows, that on the 28th day of October, 1882, the said petitioner, without appearing in the said action *in personam*, by the said Johnson Hall against it, made its application to set aside the said seizure of the said tug-boat *F. W. Devoe* by the said Marshal, upon the ground that such seizure was made outside of the jurisdiction of the Court and by an abuse of its process, and praying that the said vessel should be forthwith delivered to her master, and that such application was made upon affidavit, showing the place of said seizure to be as hereinbefore stated; that thereafter, and on or about the 14th day of November, 1882, the said United States District Court, sitting as a Court of Admiralty, denied said application of your petitioner, and claims and insists that, by virtue of the said seizure of the said tug-boat *Devoe*, at the time and place mentioned, the said District Court of the United States, for the District of New Jersey, as a Court of Admiralty, has become possessed of jurisdiction over the said cause.

FOURTH. That your petitioner has never appeared in the said cause or submitted itself to the jurisdiction of the said District Court, nor has any final decree or judgment of the said District Court been rendered in the said cause.

FIFTH. That annexed hereto are copies of the said libel and of the proceedings of the said District Court upon the application of your said petitioner, to which your petitioner prays leave to refer and make part of this petition.

SIXTH. Your petitioner further shows, and states as matter of fact, that the said United States District Court for the District of New Jersey was constituted by an Act of Congress approved September 24, 1789, entitled "An Act to establish the Judicial Courts of the United States," and that the said District by said act was made to consist of the State of New Jersey, and said District is now limited to the jurisdiction exercised by said State at the date of the passage of said act, and has been in no respect enlarged or changed since such act. That in and by the same act the State of New York was also constituted and made a district with jurisdiction co-extensive with the jurisdiction, at that date, of the State of New York. That by other Acts of Congress since the passage of said act the State of New York has been divided into several districts, but that the Southern and Eastern Districts of said State of New York now embrace jurisdiction over all that portion of the State of New York (not embraced in the Northern District of said State), to which the State of New York was entitled to jurisdiction at the time of the passage of the first-mentioned act.

That in the year 1789 the State of New Jersey had, as your petitioner is informed and believes, no jurisdiction below low-water mark over the waters of the Kill van Kull, lying between the said State and Staten Island in the State of New York, but that on the date last aforesaid the State of New York possessed and exercised jurisdiction over all waters of the Hudson River, the so-called Bay of New York and the Kill van Kull to low-water mark on the New Jersey side of said waters.

That the jurisdiction of the State of New York over the waters before mentioned and to low-water mark on the Jersey side thereof was, in 1789 aforesaid, the same in extent as that of the jurisdiction of the Province of New York, and as the latter was established in 1664 in part, and in later years more completely by Charles II of England, his brother, James, Duke of York, and the Colonial governors of New York.

That in the early colonial times of this country and prior to, during and long after the conquest of the New Netherlands by the Duke of York in 1664, the waters surrounding Staten Island were regarded and considered as the waters of the Hudson River, and Staten Island was considered and regarded as lying in the waters of the Hudson River.

That this will appear by the ancient maps of the region em-

bracing Staten Island and the waters surrounding it, among which are the Carte Figurative, a *fac simile* of which is to be found in 1st Vol. Col. Doc. of N. Y.; the map of Adrian Van Der Donck, of which a copy is in 1st Volume N. Y. Hist. Soc., Col. S. S.; map of John Ogilby, America, 1671; Map of Nicholas John Vricher, 1656; N. J. Boundary Papers, III., 706; N. Y. His. Soc. Collection of Maps, by Dish Van Der Meyde, N. Y. His. Soc. Library, and by the official acts of the Governors, Councils and assemblies of the Provinces of New Nork and East Jersey, as well as the authoritative expressions of persons in relations of confidence or close to the governing powers of the Provinces, and acts of others in like relation, and the opinions and statements of historians entitled to judicial notice and belief, chief among which evidences are the following:

Dr. O'Callaghan, in his Documentary History of New York, 4th Volume, pages 19 to 22, gives a translation of "Information relative to the taking up of land in New Netherlands by Cornelis Van Tienhoven, Secretary of the Province, 1650." The Secretary thus treats the present lower bay of New York:

> "*In the Bay of the North River*, about two miles from Sandy Hook lies an inlet or small bay. On the south shore of said bay, called Neyswesinck, there are right good maize lands."

Brodhead, in his History of New York, 1st Volume, page 525, says:

> "The patroon (Melyn) now went (August 5, 1650) to his colonie at Staten Island, for the greater security of which Van Dinck Lagen had just before purchased from the Raritans, for Van de Capellan, the lands at the *south side, in the Bay of the North River*."

Doctor Peter Heylen, Prebendary of Westminster, in the 4th edition of a folio volume originally published in 1657, entitled "Cosmographie in four Books," re-published in 1669, at page 96, Liber 4, says, in speaking of "Novum Belgium, or Nieuw Nederlant":

> "Rivers of note they have not many. That want is supplied by many large and capacious bays all along the coast. The principal of those that be, 1, Manhattes, by some called

Nasovius, but by the Dutch commonly Noordt Rivier, which *falleth into* the *sea at May-port*, so called by Cornelis May, the master of a ship of Holland."

John Ogilby, Royal Cosmographer, published in London, under the patronage of the King, in 1671, a large folio volume descriptive of America. Speaking of the rivers of New Netherland, "now call'd New York," this official cosmographer thus alluded to the Hudson:

"The Manhattans, or Great River, being the chiefest, having with two wide mouths wash'd the mighty Island Watouwaks, falls into the ocean. The southern mouth is *call'd Port May or Godyn's* Bay. In the *middle thereof lies an Island call'd the States Island.*" (American Collections from the most authentic Authors, by John Ogilby, Ed. London, 1671, page 170).

In the description of New Netherland, by Arnoldus Montanus (Amsterdam, 1671), extracts from which are found on pages 73 and 76 of the fourth volume of Dr. O'Callaghan's Documentary History of New York, there is this:

"Adrian Blok and Godyn soon discovered here divers coasts, islands, harbours and rivers. Among the rivers is the Manhattans or Great River, by far the most important which disembogues into the ocean by two wide mouths, washing the mighty Island of Matouwacs. The south *entrance was called Port May* or Godyn's Bay; *midway lies Staten Island*, and a little further up the Manhattans, so called."

In 1669, Gov. Nichols writes from London to Gov. Lovelace in New York: "Staten Island is adjudged to belong to New York," Mass. Hist. Soc. Col., XXXVII, 315.

Staten Island was purchased for James, Duke of York, April, 1670, by Francis Lovelace, then Colonial Governor of the Province of New York, under appointment by the Duke.

Valentine's Manual, 1857, p. 544.
Secy. of States (N. Y.) Patents, 4, p. 62.

The patent for the Island is from Aquepo, Warrines, Minqua, &c., true sachems, owners and proprietors of Staten Island, and grants:

"All that island lying and being *in Hudsons River*, com-

monly called Staten Island, and by the Indians Aquehonga Manacknong, having on the south the bay and Sandy Point, on the north the river and the City of New York on Manhattas Island, on the east Long Island, and on the West the main land of After Coll or New Jersey, together with," &c.

This conveyance vested in the Duke all of the Indian title to the Island and surrounding waters on west and north sides.

The original patent is in the N. Y. Hist. Soc. Library.

Whatever Dutch title to portions of the Island existed in individuals had been surrendered to the West India Company in 1661, and by the conquest of 1664 that title passed to the Crown of England.

In March, 1664, Charles II., by Letters Patent, conveyed to his brother James, Duke of York, among other, all of the territory lying between the west side of the Connecticut River and the east side of Delaware Bay, embracing in the description contained in such conveyance the Hudsons River, in terms, and Long Island, and, in general phrase, all islands within the scope of the said conveyance.

In June of the same year James, Duke of York, conveyed to Lord Berkeley and Sir George Carteret all that tract of land "hereafter (then) to be called by the name of New Caesarea, or New Jersey, adjacent to New England and lying and being to the westward of Long Island and Manhattans Island, and bounded on the east part by the main sea and part by Hudsons River, and hath upon the west Delaware Bay or river."

Leaming & Spicer, 3, 8.

At the time of the conveyance by Charles to the Duke, the Dutch were in quiet and absolute possession of all that portion of the territory so conveyed constituting the then New Netherlands and Pavonia, the latter being a part of East Jersey.

Colonel Richard Nicolls, commissioned by the Duke as Governor, proceeded with an armed force to New Amsterdam, captured the same and all the Dutch possessions, and entered into control thereof as Governor under the Duke of York.

The conveyance by Charles to his brother conveyed the Regalia of Government and vested in the grantee such authority as the Crown possessed, and had the power to delegate with slight reservations only.

The conveyance by the Duke to Berkeley and Carteret vested

in them certain jurisdictional and governing powers. The latter conveyance omitted the term "islands" in its descriptive parts.

Nicolls remained as Governor for a number of years and was succeeded by Francis Lovelace, who secured the Indian title to Staten Island as aforesaid.

Doubts arose as to the validity of the conveyance to the Duke of York, it having passed the great seal at a time when the territory conveyed was in possession of another sovereignty, and hence, in 1674, Charles, "upon the opinion of council," conveyed by Letters Patent the same territory described in his conveyance of 1664, to his brother James, and by the same boundaries and with the same descriptive terms.

Proud's History of Penn., Vol. 1, 282.

James, after the last conveyance, conveyed to Sir George Carteret all of what was then known as East Jersey, so far south as Barnegat, bounding the same in like manner as in his former conveyance to Berkeley and Carteret, namely, upon the east in part by the main and in part by Hudson's River.

The so-called lower bay of New York at this period was still regarded as the mouth of the Hudsons River.

April 23, 1674, information was received "that a ship or ships have come to anchor within Sandy Hook of the North River of New Netherland."

Col. Doc. 2, 707.

Sir Edmund Andros commissioned Governor by James in 1674, exercised jurisdiction over Staten Island and the waters surrounding, as appears by the following authorities:

Warrant, etc., Manuscript Records, Sec'y. State of N. Y., Albany.

Patent and Confirmation to Billop, Mch. 25, 1676.

In October, 1679, Dankers and Sluyter, Labadists, examining the provinces of New York and East and West Jersey with a view to the establishment of a colony of their sect, speak in their Journal of the Kill van Koll as a "large creek or arm of the River."

Mem. L. I. His. Soc., vol. 1st, p. 149.

In March, 1682, the General Assembly of East Jersey, sitting at Elizabethtown, divided that province into counties, and Bergen County (in which the site of the present dispute lies)

was defined as containing "all the settlements between Hudsons River and the Hackensack River, beginning at Constables Hook, and so to extend to the uppermost bound of the Province northward, between the said rivers."

Leaming and Spicer, 229.

In 1683, the province of New York was divided into counties by the Colonial Assembly, Colonel Dongan then Govenor, acting in that connection, and Richmond County was defined as follows: "Richmond County contains all Staten Island, Shooters Island and the Islands of Meadow on the west side thereof."

See Act Secy. State's Off., N. Y., and Revised Laws, N. Y., 1813, vol. II., Appendix.

Gov. Dongan, February 13, 1684--5, writing to the Earl of Perth, says:

> "Your agents have dispersed printed papers to ye disturbance of ye inhabitants of Staten Island. It hath been in the possion of his Rll Highss above twenty years (except ye little time ye Dutch had it) purchased be Governour Lovelace from ye Indyans in ye time of Sr George Carteret, without any prtences 'till yr agents made claime to it."
>
> Col Doc. iii. 354.

On the thirteenth of December, 1687, the King issued instructions to Matthew Plowman, Esqre. Collector and Receiver of Revenue in the Province of New York and the Territories depending thereon, in the third clause of which the Hudson's River is styled "the River or Channell of New York or Hudsons River."

In the eighth clause of these instructions is an Order in which the waters leading to Perth Amboy are styled "the River or Channell of N. York or Hudson's River."

Col. Doc. iii. 501, 502.

On the tenth of September, 1680, the Duke of York granted, bargained, and sold unto Sir George Carteret, grandson of the original grantee of the province of East Jersey, "the free use of all Bays, Rivers and Waters, leading unto or lying between the said Premisses (of East Jersey) for Navigation, free Trade, Fishings or otherwise."

N. J. Boundary Papers, 4. *Id.*
Leaming & Spicer, 140, 150.

The commission by James to Dongan as Colonial Governor, September 30th, 1682, recites the conveyance by Charles to James of "ye land from west side Connecticut River to east side of Delaware Bay, and whereas I have since, for divers good causes and considerations released and confirmed to Sir George Carteret and his heirs and unto Edward Billing and others and their heirs, all that tract of land parcel of ye premises commonly called and known by the name of East and West Jersey, situate on the west side of Hudsons River."

In 1686, Governor Dongan writing to the Lord President of the Council says:

> "We in this Government look upon that bay that runs into the sea at Sandy Hook to be Hudson River."
>
> Whitehead's "East Jersey under Proprietary Governments."

In 1697 the proprietors of East New Jersey petitioned the King to make Perth Amboy a port of entry, which petition by an order in Council of October 25th, of that year, was referred to the Board of Trade for their opinion thereon. On the 25th of November in the same year, the Board of Trade having laid its opinion before the King in Council, the same was approved by his Majesty, and he was thereupon pleased to dismiss the petition of the proprietors of East New Jersey. Among the reasons assigned by the Board of Trade adverse to the prayer of the petition, which reasons were approved by the King in Council at the Court at Kensington, are these, viz:

> "That at the separation of the Jerseys from the Province of New Yorke, the citty of New York was the common port for both. That it is in no place that we know of, either in England or elsewhere, usuall to have two ports independent of each other in one and the same River, or within the same capes or outlet into the sea, such a practice being manifestly liable to great inconveniences. *That Perth Amboy lies on one side of the mouth of the same river which runs by the Citty of New York (that river being divided by an Isld, called Staten Island)*, and is within the same capes."
>
> New York Colonial Manuscripts, xli., 135.

On the 7th of December, 1700, Lord Bellomont, then Governor of New York, ordered Colonel Romer,

"To measure the distance across the Narrows and to sound the depth of water there as well as *in a second arm of Hudson's River called the Coll, between Staten Island and East Jersey*, and to ascertain whether any ships and bombketches could come around by Amboy and consequently attack the city of N. York."

"Item, to select a couple of places both at the Narrows and the Coll where suitable fortifications could be erected and the enemy be thereby forestalled in his undertakings."

On the 13th of January, 1701, Colonel Romer, after reporting the accomplishment of his instructions respecting the Narrows, proceeds:

"In regard to *the other branch of the Hudson's River called the Coll, between Staten Island and East Jersey*, I have sounded it from Amboy to Tampson's Point and Elizabeth Town, and find from Amboy to the above-named points 8, 7, 6, 5 and 4 fathoms of water," &c., &c. ("Colonial Documents," iv., 836, 837).

In 1709 the Lieutenant-Governor, Council and General Assembly of East Jersey enacted that in the eastern division "the County of Bergen shall begin at Constables Hook and so run up along the Bay and Hudson's River to the partition point between New Jersey and the province of New York, and so run along the partition line between the provinces and the division line of the eastward and western division of this province to Pequaneck River, and so to run down the said Pequaneck and Passaic River to the sound, and so to follow the sound to Constables Hook where it began."

Paterson's Laws of New Jersey, p. 3.

That the boundaries of said Bergen Co. upon the water remained unchanged by the legislation of New Jersey down to 1807.

In 1730 the charter of the City of New York, known as the Montgomery Charter, expressed the jurisdiction of that city as extending "to low water mark on the west side of the North River, or so far as the limits of our said province extend there."

Bliss, Olney & Whitney's "Special Local Laws Affecting New York City," Vol. I., p. 23.

And your petitioner further shows that the jurisdiction of the State of New York over the waters of the Kill von Kull continued without interruption, as it is informed and believes, down to the year 1833, when, by treaty between the States of New York and New Jersey, the same was changed and defined, but that such change did not affect the limits or extent of the District of New Jersey or the district or districts of New York; that the continuation of the jurisdiction of New York over the waters aforesaid is shown by the legislation of that State; that in the year 1813 the Legislature of the State of New York, creating Commissioners of a Land Office, composed of its chief state officers, empowered them to grant lands under water in the Hudson's River adjacent to the State of New Jersey.

Rev'd Laws of N. Y., Vol. 1, p. 293.

The Revised Statutes of New York, 1830 (Part I., p. 65), describe the boundaries of the State with precision and embrace the waters of the Kill van Kull to low water mark on the Jersey side.

And your petitioner further shows in support of the fact that the said District Court of New Jersey has no jurisdiction over the place of seizure of your petitioner's vessel, so much of the opinion of Justice Elmer, of the Supreme Court of New Jersey, in State vs. Babcock, 1 Vroom, 32, as affords a brief history of the claim of New Jersey to an extension of its jurisdiction into the Hudson River and that such claim sprung up after the Revolutionary War; also the decisions of the District Court of the United States for the Southern District of New York in the case of the Eaton (reported 9th Benedict, 289), City of Milwaukee (1 Federal Reporter, 611), Carfield vs. Conyell (4 Wash. C. C. R., 371), Handly's Lessees vs. Antony, 5 Wheaton, 374.

WHEREFORE, your petitioner prays that this Honorable Court will issue its writ of prohibition to the said District Court of the United States for the District of New Jersey, proceeding as a Court of Admiralty, restraining and enjoining the said Court from exercising the jurisdiction asserted by it in the said action. And your petitioner will ever pray.

The Lowe Martin Co
by James McGee
President

SOUTHERN DISTRICT OF NEW YORK, ss.: Jas McGee

being duly sworn, says, that he is the President
of the Devoe Manufacturing Company. That the foregoing petition is true of his own knowledge except as to matters therein stated upon information and belief and as to those matters he believes it to be true.

Sworn before me, this 27th day of March 1883 } Jas McGee

Seal

Laurence Ryland
Notary Public Kings Co
Cert filed in N.Y. Co

SCUDDER & CARTER,
Attorneys for Petitioner.
HENRY J. SCUDDER,
Of Counsel.

UNITED STATES SUPREME COURT. 17

IN THE MATTER

OF

The Petition of the DEVOE MANUFACTURING COMPANY, a Citizen of the State of New York, for a Writ of Prohibition in the United States District Court for the District of New Jersey, proceeding as a Court of Admiralty. 18

Please to take notice that the within petition will be presented to the Supreme Court of the United States at the Capitol, in the City of Washington, at the opening of Court on Monday, the 9th day of April 18 83 and motion then and there made for a writ of prohibition, to be addressed to the Judge of the District Court of the United States for the District of New Jersey, restraining the said Court, proceeding as a Court of Admiralty, from further proceeding in the suit of Johnson Hall against the Devoe Manufacturing Company mentioned in said petition, and for such other and further relief as may be just. 19

Yours, &c.,
SCUDDER & CARTER,
Attys. for Petitioner,
66 Wall Street,
New York.

To HON. JOHN T. NIXON, 20
Judge of the District Court of the United Sates,
for the District of New Jersey, Trenton, N. J.

LINSLY ROWE, ESQ.,
Clerk of said Court,
Trenton, N. J.

BEEBE, WILCOX & HOBBS, ESQS.,
Attys for Johnson Hall, Libellant,
No. 69 Wall Street,
N. Y.

21 UNITED STATES OF AMERICA, }
District of New Jersey, } ss.:

I, LINSLY ROWE, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed are true copies of *libel, pluries citation, affidavit and order to show cause, affidavit in opposition to motion, &c., opinion and order in re Johnson Hall vs. The Devoe M'f'g Co.*, as the same remain of record and on file in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court at Trenton, in said district, this twenty-second day of November A. D. eighteen hundred and eighty-two.

22 [SEAL.]

LINSLY ROWE, Clerk.

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TO THE HONORABLE JOHN T. NIXON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

23

The libel and complaint of Johnson Hall of said district against The Devoe Manufacturing Company in a cause of damage, civil and maritime, and thereupon the libellant alleges and articulately propounds as follows:

FIRST. That the said respondents are now within the jurisdicrion of this Court or have goods, chattels, credits and effects therein.

SECOND. That during the times hereinafter mentioned the
24 respondents were and are now a corporation duly organized and existing under the laws of the State of New York, and capable of suing and being sued.

THIRD. That on the twenty-third day of March, in the year one thousand eight hundred and eighty-two, the libellant was the owner of the canal boat "T. W. Griffin," and that she was at such times tight, staunch and strong and well and sufficiently manned, tackled and provided.

FOURTH. That on said twenty-third day of March, 1882, the said canal boat "T. W. Griffin" was loaded with a cargo of coal which she had received on board at Port Johnson, and to be

delivered on Newtown Creek near the head thereof. That said 25
boat was taken in tow by the tug "Robert Burnett" to be towed to her said destination. That said tug proceeded with said boat in tow and when she had arrived at or about the mouth of said Newtown Creek, on the East River, had three other boats in tow. That there were two boats alongside on each side of said tug "Robert Burnett" and the libellant's boat was the outside boat on the port side of said tug. That said tug and tow made up as aforesaid reached the mouth of the creek somewhere in the neighborhood of twelve o'clock on the day aforesaid, the tide at the time being about flood. That when said tug 26
and tow had got nicely into the creek and straightened up, libellant discovered the tug "F. W. Devoe" just about entering the mouth of said creek from the up-town part of said East River with a lighter on her port side lashed alongside thereof and the lighter "Willie Dill" on a hawser astern, and about 100 feet apart, from said tug "F. W. Devoe"; the said hawser being attached to the tug astern and run and fastened to the bow of said lighter "Willie Dill," that the said tug "F. W. Devoe" attempted to pass the said tug "Robert Burnett" and her tow aforesaid, and did actually pass very close to said tow, but that 27
at the time the lighter astern, to wit: the "Willie Dill," was on a rank sheer to starboard and towards the tow. That the said tug "F. W. Devoe" proceeded on without slowing or stopping and with the lighter on said sheer, and the said lighter with great violence run into libellant's boats, striking her astern about athwart ships and doing serious damage thereto.

Fifth. That said damage was solely owing to the imprudent and reckless manner in which said tug "F. W. Devoe" attempted to pass the said tug "Robert Burnett" and her tow and in among other respects, in not going further to the other side or 28
the north side of said creek, in that she being the pursuing vessel had no right to embarrass or encumber the navigation of the "Robert Burnett" and her tow, and in that she should have stopped when the said lighter "Willie Dill" was not following her straight astern, in that the man at the helm of said lighter "Willie Dill" was incompetent, and not steering properly.

Sixth. That it will cost to repair the damage aforesaid, so far as it can now be ascertained, the sum of four hundred dollars, and that said boat will be detained, undergoing repairs the period of about twelve days and a fair demurrage therefor would be

29 the sum of sixty dollars, making in all the sum of four hundred and sixty dollars, payment of which has been demanded and refused.

SEVENTH. That said Devoe Manufacturing Company, the respondents, were at the time aforesaid and are now the owners of said tug "F. W. Devoe" and the said lighter "Willie Dill".

EIGHTH. That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellant prays that process in due form of law
30 may issue against said respondent, containing a clause of foreign attachment; that if said respondent cannot be found then that its goods, chattels, credits and effects be attached. And that this Honorable would be pleased to pronounce for the claim aforesaid and costs, and to condemn said respondent to pay the same, and that libellant may have such other relief as may be just.

JOHNSON HALL.

Sworn to before me, this 18th day of April, 1882.

31 JAMES MACKLIN,
Notary Public,
[Notarial Seal] N. Y. Co.

BEEBE, WILCOX, & HOBBS,
Libellant's Proctors.
W. R. BEEBE,
Advocate.

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UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, } ss.:
32

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL OF THE DISTRICT OF NEW JERSEY. GREETING:

Whereas, a libel was filed in the District Court of the United States for the District of New Jersey on the twenty-fifth day of April, A. D. eighteen hundred and eighty-two, by Johnson Hall, Libellant, against the Devoe Manufacturing Company in a cause of damage, civil and maritime, to the amount of four hundred and sixty dollars and praying for a citation against said respondent with a clause of foreign attachment, &c., pursuant to the rules and practice of this Court.

Now, therefore, we do hereby empower and strictly charge 33
and command you as oftentimes before we have commanded you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your District, that it be and appear before the said District Court on the fourteenth day of November, A. D. 1882, to be held at the United States Court House, in the city of Trenton, in said District, at ten o'clock in the forenoon of that day, then and there to answer the said libel and to make its allegations in that behalf.

And if the said respondent cannot be found in your District 34
that you attach its goods and chattels to the amount sued for, and if such property cannot be found that you attach its credits and effects to the amount sued for in the hands of garnishees, wheresoever in your District they may be found, and that you cite and admonish the said garnishees that they be and appear before the said District Court at the same time and place aforesaid and there answer on oath or solemn affirmation as to the debts, credits, or effects of the said respondent in their hands, and to such interrogations touching the same as may be propounded by the libellant.

And have you then and there this writ, with your return 35
thereon.

Witness the Honorable John T. Nixon, Judge of said Court, at the City of Trenton, in the District of New Jessey, this twentieth day of October, A. D. eighteen hundred and eighty-two and of our Independence the one hundred and seventh.

LINSLY ROWE,
Clerk.

PEEBE, WILCOX & HOBBS,
Proctors.

36

In obedience to the within writ, I attached the steamboat F. W. Devoe on the 27th day of October, A. D. 1882, as the property of the Devoe Manufacturing Co. (the said respondent not being found in this District), and gave due notice to all persons claiming the same that this Court will, on the 14th day of November, A. D. 1882, proceed to the trial and condemnation thereof, should no claim be interposed for the same.

W. BUDD DEACON,
U. S. Marshal.

Dated Nov. 11th, 1882.

37 DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

JOHNSON HALL,

vs.

THE DEVOE MANUFACTURING COMPANY.

38 SOUTHERN DISTRICT OF NEW YORK, ss.:

ABRAM VAN LEUVEN, being duly sworn, says that he is the master of the tugboat "F. W. Devoe," whereof the Devoe Manufacturing Company, named as respondent herein, is the owner; that on the 27th day of October instant the said tug-boat was afloat in that portion of the waters of the State of New York and of the Southern District of New York, which is known as Kill von Kull, between Staten Island and New Jersey, and that on said day in the said waters the said tug-boat was seized by
39 the Marshal of the United States for the District of New Jersey, by virtue of process in the above entitled action, who still detain the said boat in his custody and refuses to give her up.

That at the time of such seizure the said boat was afloat in said Kill von Kull, made fast at the end of a dock at Bayonne, N. J., at least three hundred feet below high water mark and nearly the same distance below low water mark in said Kill von Kull, and about half a mile from the entrance into the Bay of New York from the said Kill.

ABRAM VAN LEUVEN.

40 Sworn to before me October 27th, 1882.

J. ARCHIBALD MURRAY,
Notary Public,
(Notarial seal.) N. Y. Co.

DISTRICT COURT OF THE UNITED STATES, 41

FOR THE DISTRICT OF NEW JERSEY.

JOHNSON HALL

vs.

THE DEVOE MANUFACTURING COMPANY.

42

The Devoe Manufacturing Company appearing solely for the purpose of moving to set aside the service of process hereinafter mentioned, and having for that purpose presented the affidavit of Abram Van Leuven hereto annexed, now upon the said affidavit and the proceedings herein,

It is ordered that the libellant above named and the Marshal of the United States for the District of New Jersey show cause before me at the United States Court room, in the United States Court and Post-Office building in the city of Trenton, in said District of New Jersey, on the first day of November, 1882, at 10 o'clock A. M. of that day, why the service of process herein by the seizure of the tug-boat F. W. Devoe by said Marshal should not be set aside, upon the ground that such seizure was made outside the jurisdiction of the Court, and by an abuse of its process, and why said vessel or tug-boat should not forthwith be delivered to her master. 43

And why such further and other order as in the premises may be just should not be granted.

And until the hearing and determination of this motion let all proceedings on the part of said libellant and said Marshal in this action be stayed. 44

Dated Trenton, October 28, 1882.

JOHN T. NIXON,

J.

The above motion is hereby adjourned to Monday, November 6th, 1882, at 10 A. M.

BEEBE, WILCOX & HOBBS,
Proctors for Libellant.

45 SOUTHERN DISTRICT OF NEW YORK, ss.:

GEORGE A. MILLER, being duly sworn, says that on the 28th day of October, 1882, at Jersey City, New Jersey, he served the within affidavit and order on W. Budd Deacon, U. S. Marshal for the District of New Jersey, by delivering to him a copy thereof and leaving the same with him, at the same time exhibiting to him the within original order.

GEORGE A. MILLER.

Sworn to before me
October 31st, 1882.

46 J. ARCHIBALD MURRAY,
Notary Public,
(Notarial Seal.) N. Y. Co.

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DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

47 JOHNSON HALL
vs.
THE DEVOE MANUFACTURING COMPANY.

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHARLES RAY, being duly sworn, says that he was present at the time and when the tugboat "F. W. Devoe" was seized herein on the 27th day of October, 1882.

48 Deponent further says that said tugboat was at the time of such seizure fastened to a wharf or dock at Bayonne, in the State of New Jersey; that she was fastened by means of line or fastening run from the said tug and fastened thereon to spiles on the said dock, and was lying close up to the said wharf or dock.

CHARLES RAY.

Sworn to before me this 31st
day of October, 1882.

JAMES MACKLIN,
Notary Public,
N. Y. Co.

(Notarial seal.)

UNITED STATES DISTRICT COURT, 49

DISTRICT OF NEW JERSEY.

JOHNSON HALL,
Libellant,

vs.

THE DEVOE MANUFACTURING COMPANY,
Respondent.

*Libel in personam.* 50

BY NIXON, J.:

A libel *in personam* was filed in the above case, alleging as the cause of action a collision between the canal boat "T. W. Griffin," whereof the libellant was owner, and the tugboat "F. W. Devoe," whereof "The Devoe Manufacturing Company" was owner. The collision occurred in March, 1882, in the East River, near the mouth of Newtown Creek, in the Eastern District of New York. 51

A monition issued with the usual attachment clause. The Marshal has made his return that the respondenf, a foreign corporation, was not found in his district, and that he had seized the tugboat "F. W. Devoe" and held the same to respond to the libellant's claim for damages. A motion is now made to set aside the service of process on the ground of a want of jurisdiction in the Court. It appears from affidavits filed and used at the hearing that on the 27th of October last, when the seizure was made by the Marshal, the "F. W. Devoe" was lying in the Kill von Kull, between Staten Island and New Jersey, 52 fastened to the end of a dock at Bayonne, in New Jersey, two or three hundred feet below low-water mark and about half a mile from the entrance to the Bay of New York.

The proctor for the respondent insists that although the tug when seized was fastened to a pier extending into the water from the New Jersey shore, she was lying below low-water mark in Kill von Kull, and hence was within the exclusive jurisdiction of the Eastern District of the State of New York.

The precise claim is, that in all admiralty proceedings, the jurisdiction of the District Courts of the United States for the

53 Southern and Eastern Districts of New York extends over the waters of the Hudson River and Kill von Kull, to low water mark on the western shores; to the exclusion of the District Court of the United States for the State of New Jersey.

The question is an important one, involving large interests, and demands careful consideration. If the construction contended for can be fairly given to the legislation of Congress in defining the judicial districts of New Jersey and New York, the people of the first named State have been laboring under a delusion for many years in regard to its territorial boundaries, and
54 the judges of this Court have been exercising unwarrantable authority over cases in admiralty, which should have been tried and determined in the district of our sister State.

The question came before the late District Judge (Blatchford), of the Southern District of New York, in 1878, in the case of the schooner *L. W. Eaton*, and seems to have been examined by him with great care (IX Ben. 289).

The vessel had been attached by the Marshal of the New York District on the first of April, 1875, being at the time afloat and fastened by means of lines to a dock at Jersey City and out-
55 side of low-water mark, the wharf projecting into the navigable waters of the Hudson River, west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek. A motion was made on beialf of the claimant to discharge the attachment, on the ground that the vessel was not at the time of the seizure in the jurisdiction of the Court.

The learned judge denied the motion, and filed an elaborate opinion, in which he held (1) That it was the established law of that district that the *locus in quo* in such a case was within the jurisdiction of the Southern District of New York in admiralty.
56 (2) That said jurisdiction existed prior to the agreement of September 16, 1833, between New York and New Jersey, which agreement is set forth in the Act of Congress of June 28, 1834 (4 U. S. Stat.-at-Large, 708), and that nothing within the agreement or the Act restricted the jurisdiction. And (3) That section 541 and 542 of the Rev. Stat. of the U. S. did not have the effect of altering the jurisdiction.

It is quite obvious, from carefully reading his opinion, that when he assumed it was the established law of his district that the *locus in quo* was within his jurisdiction, the Judge only meant to assert that his distinguished predecessor, Judge Betts,

had so declared the law. I cannot find that the question was 57
ever discussed before May, 1860, when it arose before Judge Betts in the case of *The United States vs. The ship Julia Lawrence*. His opinion was never published in any volume of his Admiralty Decisions, and its full text first appears in Judge Blatchford's opinion.

The jurisdiction of the New York Court over the place of the seizure was challenged in that case, it being admitted on both sides that the ship when seized was attached to a pier or dock on the New Jersey side of the river and upon waters of the Bay. Judge Betts states that two questions were debated before 58
him on the issue of law. The first regarded the actual boundary line of the Southern District of New York. He does not say what the second was, but it is to be inferred from the subsequent reasoning that it had reference to the effect which the arrangement entered into between the States of New York and New Jersey respecting their mutual boundary line, had upon the antecedent legislation of Congress. He correctly holds that any variation of the line made by the assent of New York subsequent to the establishment of the United States judicial districts would not affect dimensions and authorities of those dis- 59
tricts without the full concurrence of the Government of the United States in such change.

Entertaining such profound respect for the opinion of this able Judge, I wish to suggest with much diffidence that the unsound conclusions which he reached arose from two false assumptions. He assumed (1) That the judiciary act of 1789 fixed the boundary line of the District of New York to low-water mark on the western shore of Hudson River, and (2) That the agreement entered into in 1833 between New York and New Jersey in regard to the boundary altered or changed some pre- 60
viously existing line.

If it can be shown that no foundation in fact existed for such premises not much weight should be given to the conclusions drawn from them.

(1) As to the first assumption, the second section of the judiciary act approved September 24, 1789, (1 U. S. Stat. at Large, 73), divides the United States into thirteen judicial districts, and its only statements in regard to New Jersey and New York are: "One to consist of the State of New York and to be called the New York District, and one to consist of the State of New Jersey

61 and to be called the New Jersey District." It is an historical fact, that at that time there was an existing controversy between these States respecting the proper running of the line dividing their jurisdiction—New York claiming the whole of the Hudson River to the low-water mark of the western shore, and New Jersey insisting that her territorial boundary extended to the middle of the river. Congress did not attempt to settle the conflict; expressed no opinion on the question of boundary, but simply constituted the districts, limiting their jurisdiction to State lines, wherever the interested parties should afterwards de-
62 termine these lines to be. I find nothing more definite in this respect in the act of April 9, 1814 (3 U. S. Stat. at Large, 120), where Congress divided New York into two districts, although Judge Betts states in his opinion that he discovers there "more distinctness of discrimination in the re-statement of the boundary line" than he did in the act of 1789. The only reference to the subject is in the first section, where it is enacted that "the counties of Renssellaer, Albany, Schenectady, Schoharie and Delaware, together with all that part of the State lying south of the above-named counties, shall compose one district, to be
63 called the Southern District of New York, and all the remaining part of the said State shall compose another district, to be called the Northern District of New York."

His Honor Judge Blatchford seems to lay great stress upon the fact that "by the Revised Statutes of New York, which took effect January 30, 1830, it was declared that the boundary of the State of New York as its jurisdiction was then asserted, ran from a point on the west side of Hudson River in the latitude of 41 degrees north "southerly along the west shore at low-water mark of Hudson River, of the Kill von Kull of the
64 Sound, between Staten Island and New Jersey, and of Raritan Bay to Sandy Hook" in such manner as to include—all the islands and waters in the Bay of New York and within the bounds above described. "Clearly," says the learned Judge, the *locus in quo*" in this case (Eaton) was by such description within the State of New York, and it was therefore within the Southern District of New York."

In reply it may be suggested that many years before, to-wit: on the third of December, 1807, the Legislature of New Jersey passed an act which declared, after reciting in the preamble, that the Commissioners of the States of New York and New

Jersey had met and failed to come to an amicable adjustment of 65
the eastern boundary line of the State, and that it was necessary to preserve the lawful jurisdiction of the State until the existing controversy was brought to a legal conclusion and determination—that the boundary line of the county of Bergen (then adjoining the Hudson River, Kill von Kull and New York Bay) extended to the middle or midway of the waters adjoining said county; and imposed severe penalties upon all persons who attempted without authority from New Jersey to execute legal process therein.

Would it not be quite as pertinent to respond, "Clearly the 66
'*locus in quo*' in this case was, by such description, within the State of New Jersey, and was therefore within the jurisdiction of its District Court?"

It may be added in this connection, that the act to create the Eastern District of New York was approved February 25, 1865, and the language there employed reveals the same congressional intention to limit the jurisdiction to State lines.

The first section declares that the Counties of Kings, Queens, Suffolk and Richmond, in the State of New York, with the waters thereof, are constituted a separate judicial district of the 67
United States, to be styled the Eastern District of New York. The second section gives to the District Court of the Eastern District concurrent jurisdiction with the District Court for the Southern District, over the waters within the Counties of New York, Kings, Queens and Suffolk, in the State of New York, and over all seizures made and matters done in such waters. By a singular oversight no concurrent jurisdiction was provided for the County of Richmond (Staten Island) and its waters, and as the Kill von Kull are in part the waters between the County of Richmond, in New York, and the State of New Jersey, the *locus* 68
*in quo* in this case, if not in New Jersey, is within the exclusive jurisdiction of the Eastern District. This district is expressly limited to counties in the State of New York, and as it has been created long since the year 1833, when the two States definitely settled their boundaries, it will hardly be insisted that its jurisdiction is not to be limited and determined by the agreement or compact of 1833.

But I prefer to put my denial of the motion in this case upon other and higher grounds.

(2) The second assumption is that the agreement of 1833

69 altered or changed some previously existing boundary line between the States.

It did not alter or change what was before fixed, but rather established what was before unsettled.

It is conceded that New York had always claimed the whole of Hudson River to low water mark on the western shore. But New Jersey never acceded to the claim. In colonial times her authorities had insisted that a just construction of the grant from the Duke of York to Berkley and Carteret allowed the jurisdiction of the province to extend to the middle of the Hud-
70 son River. At the close of the Revolutionary War, the State renewed the contention on the additional ground that her boundary was thus secured by reason of the conquest from the British Crown. The controversy led to the appointment of commissioners by the respective States, first in 1806, then in 1824, and finally in 1833, to adjust the conflicting claims.

A brief reference to the legislation of the two States will show the nature, character, difficulty and result of the contest.

On the 21st of November, 1806 (P. L., p. 751), the Legislature of New Jersey, after a long preamble setting forth with minute
71 particularity the claims of the State under the Colonial Charter, and by right of conquest from the mother country, appointed five commissioners, with full power and authority, on behalf of New Jersey, to meet and make a final agreement with commissioners to be appointed on behalf of New York, "to settle the limits and extent within which they shall exercise their rights of jurisdiction, respectively, in and over all the waters lying and being between the shores of said States, and further to settle the eastern boundary of New Jersey, as to them may seem just and reasonable."

72 The Legislature of New York promptly responded, and on the third of April following (P. L. of 1807, p. 124) appointed five commissioners to meet those from New Jersey "to settle all disputed claims as to territory and jurisdiction."

The commissioners met, and as neither side was prepared to recede from the position of the respective States, they separated without coming to an agreement.

On the third of December, 1807 (P. L., p. 18), the Legislature of New Jersey passed the Act above referred to, wherein, after reciting the failure of the commissioners to come to any amicable adjustment of the eastern boundary of the State, again asserted

the right of New Jersey to extend to the middle of Hudson River; prescribed the punishment to be inflicted upon all persons who, without the leave of the State, attempted to exercise any authority thereover; placed in the hands of the Governor three thousand dollars to be expended by him in prosecuting and defending to final judgment any suit or suits which he deemed necessary for finally determining the jurisdictional line between the States; and also renewed the powers of the commissioners before appointed to resume negotiations, provided the State of New York authorized its commissioners to do the same. 73

The Legislature of New York answered on the 6th of April following (P. L. of 1808, p. 313) by reiterating the claim of the State to the whole of Hudson River, and imposing penalties upon all persons who attempted to exercise any authority thereon, under the authority of New Jersey. 74

No further steps for the settlement of the controversy were taken on either side until December 10th, 1824, when the Legislature of New Jersey enacted another law, authorizing the Governor to appoint five commissioners to meet a like number to be chosen by New York, to determine the limits of territory and jurisdiction between the two States. No notice being taken of this by New York, and the law expiring by its own limitation on the 1st of December, 1826 (P. L., p. 25), the Legislature revived and continued in force the Act until November 1st, 1827. 75

The Legislature of New York responded on the 27th of April following (P. L. of 1827, p. 326), and after reciting in a preamble that New York was always disposed to settle any differences that existed between her and any neighboring State upon amicable principles, appointed five commissioners with full powers to meet the commissioners of New Jersey "to agree upon, settle and determine the limits of territory and jurisdiction between said States." 76

These commissioners also failing to come to any agreement, the New Jersey commissioners, in 1827, proposed to have the controversy in respect to the boundary submitted to the Supreme Court of the United States, as an impartial tribunal to arbitrate between the parties, which the New York Commissioners declined.

All attempts at adjustment proving abortive, on the 6th of March, 1828 (P. L., p. 199), the Legislature of New Jersey determined to bring the question to a close and passed an Act

77 reciting in a preamble that disputes had existed for many years between the States of New Jersey and New York relative to the eastern boundary of New Jersey, and more particularly as the said boundary concerned the Hudson River and adjacent waters, and that several unavailing efforts had been made on the part of New Jersey to settle said disputes by amicable negotiation, and then directed the Attorney General of the State to institute legal proceedings in the Supreme Court of the United States, in the name and on behalf of the State of New Jersey, against the people of the State of New York, for the purpose of ascertaining
78 and establishing the questions relative to boundary and jurisdiction between the States as they respected the eastern boundary of New Jersey.

Such suit was begun in the month of June, 1829. The bill filed alleged "that the State of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson River from the 41st degree of north latitude to the Bay of New York, to midway of said river and to the midway or channel of said Bay of New York, and the whole of Staten Island Sound, together with the land covered by the
79 water of said river, bay and sound to the like extent.

The Governor of New York in a message called the attention of the Legislature to the pendency of said suit (see The People vs. Cent. R. R. Co. of N. J., 42 N. Y., 291). For the first time during the whole continuance of the dispute the Legislature of New York now took the initiative in renewing negotiations, and on the 18th of January, 1833, passed an Act (P. L., p. 6), authorizing the Governor to appoint three Commissioners to meet Commissioners who might be appointed by the State of New Jersey "to negotiate and agree respecting the territorial limits
80 and jurisdiction of the two States."

New Jersey at once responded, and on the 6th of February following empowered the Governor to appoint three Commissioners to meet those appointed by the Governor of New York under the provisions of the foregoing Act, and with them "to negotiate and agree respecting the territorial limits and jurisdiction as to them might seem just." The Commissioners appointed by the Governors of the respective States under the legislation were six of their eminent public men: Benjamin F. Butler, Peter Augustus Jay and Henry Seymour on the part of

New York, and Theodore Frelinghuysen, James Parker and 81
Lucius Q. C. Elmer on the part of New Jersey.

After several conferences they came to an amicable adjustment of the conflicting claims on the 16th of September, 1833, in the City of New York. By Article VIII. of the agreement it was not to become binding on the two States until confirmed by the Legislatures thereof respectively and approved by the Congress of the United States.

It was ratified and confirmed by the State of New York on the 4th of February, 1834, by the State of New Jersey on the 26th of February, 1834, and approved by Congress June 28, 82
1834 (4 U. S. Stat. at large, 711).

I think it is conclusive, from this review of the claim and action of the two States in regard to their boundary line, and the methods adopted for its amicable adjustment, that the question was an open one in 1789 and that no settlement was reached until the agreement of the Commissioners was ratified and approved in 1834. It is not to be assumed, as my learned brethren of the New York District assume, that Congress, in creating the Districts of New York and New Jersey, adopted the claim of boundary then made by New York rather than the claim of New 83
Jersey.

It follows from this view that the agreement or compact of 1833 must be regarded as rendering certain what was before uncertain, respecting the territorial jurisdiction of the District Courts of the United States for New York and New Jersey. While it is admitted that the extent of the jurisdiction of the Federal Courts cannot be restricted or enlarged by any State legislation or agreement, I see no difficulty in invoking such legislation or agreement to give definiteness and certainty to questions which Congress had necessarily left vague and unde- 84
termined.

We are now brought to the inquiry, what adjustment was made by the Commissioners of these long pending conflicting claims?

The subject matter of the reference were territorial limits and jurisdiction.

The first article of the compact relates to the division of the territory in dispute, and the remaining articles to the jurisdiction over the same.

Article 1 fixes the boundary line between the two States from

85 a point in the middle of Hudson River opposite the point on the western shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea—at the middle of the said river, of the Bay of New York, of the water between Staten Island and New Jersey and of Raritan Bay, to the main sea, except as therein otherwise particularly mentioned.

Mr. Justice Elmer, the last surviving member of the commission, and whose thorough knowledge of all the steps leading to the agreement, places him in a favorable position to interpret
86 its precise meaning, has so succinctly stated the substance of the various articles in regard to jurisdiction, that I shall content myself with quoting his language. In the case *The State vs. Babcock, 1 Vroom, 30*, he says: "By the compact the State of New York has exclusive jurisdiction of and over all the waters of Hudson River and of and over the lands covered by the said waters to the low-water mark on the New Jersey shore, and the State of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks
87 and improvements made and to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock (except as to quarantine regulations), and the exclusive right of regulating the fisheries on the westerly side of the river."

The learned Judges Betts and Blatchford seem to attach much importance to the fact that Congress, when it ratified the State compact, added a proviso that nothing therein contained should be construed to impair, or in any manner affect, any right of jurisdiction of the United States in and over the islands or
88 waters which formed the subject of the agreement.

This was probably added from excess of caution on the part of the Legislature.

It is not apparent how the mere assent of the National Government to the adjustment of boundaries and jurisdiction between States whereby the exercise of authority by Federal Courts on each side of the line is definitely determined and could, in any manner, affect a right of jurisdiction of the United States.

The vessel being fastened to a wharf or pier on the western side of the Kill von Kull was within the exclusive jurisdiction

of New Jersey and the motion to set aside the attachment must be denied. 89

MESSRS. SCUDDER & CARTER, Proctors for The Devoe M'f'g Co.
MESSRS. BEEBE, WILCOX & HOBBS, Proctors for Libellant.

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At a Stated Term of the District Court of the United States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the fourteenth day of November, in the year of our Lord one thousand eight hundred and eighty-two. 90

Present—HIS HONOR, JOHN T. NIXON, District Judge.

IN ADMIRALTY.

JOHNSON HALL,
Libellant,

vs.

THE DEVOE MANUFACTURING COMPANY,
Respondent. 91

On Libel. On Petition and Motion to set aside service of writ, &c.

The above matter being brought on for hearing in the presence of F. A. Wilcox, Esq., of counsel with libellant, and Geo. A. Miller, Esq., of counsel with petitioner, and argument being heard thereon, and the Court having considered the same and being of the opinion that the prayer of said petition should not be granted, it is accordingly ordered that said petition be and the same is hereby dismissed with costs. 92

JNO. T. NIXON,
J.

OFFICE SUPREME COURT U. S.
FILED
APR 9 1903
JAMES H. McKENNEY, Clerk.

B-ord

108-407

# U. S. Supreme Court.

In the Matter

*of*

The petition of the DEVOE MANUFACTURING COMPANY, a citizen of the State of New York, for a Writ of Prohibition to the United States District Court for the District of New Jersey, proceeding as a Court of Admiralty.

*Points for Petitioner.*

This application is made upon the petition of the Devoe Manufacturing Company, a corporation created by and existing under the laws of the State of New York, in the State of New York, and upon the proceedings of the District Court of New Jersey, as a Court of Admiralty, in a libel *in personam*, filed in said Court against the petitioner.

The petitioner not being a resident of the District of New Jersey, is sought by the said District Court to be brought within its jurisdiction, by the seizure, under process of foreign attachment, of a vessel lying in the Kill von Kull, and attached to the end of a dock, far below low water mark. (Motion papers, fol. 52.)

The petitioner, without appearing generally, so as to give jurisdiction to the Court, specially, and for the purpose only of questioning its jurisdiction, applied to have such decision set aside, upon the ground, that the place where the vessel seized was lying was not within the jurisdiction of the said Court. Upon hearing, the Court denied the application, and held the seizure good, on the ground that said Court held jurisdiction over the waters where the vessel lay, and over the waters of the Kill von Kull to the centre thereof.

The opinion of the learned Judge of the District Court of New Jersey is found on pp. 13 to 23 of the motion papers.

## POINTS.

**I.**—The office of the writ of prohibition is to prevent an unlawful assumption of jurisdiction.

The writ lies to a Court of Admiralty only when that Court is acting in excess of its jurisdiction.

*Ex parte* Gordon, 104 U. S., 516.
*Ex parte* Easton, 95 U. S., p. 77.

**II.**—The District Court of New Jersey is proceeding here as a Court of Admiralty, but it gains jurisdiction of the respondent only by excess or abuse of power in attaching property outside the limits of its district and forcing respondent to appear in order to preserve its property.

The respondent or petitioner here has no redress by appeal. If it appear, in order to try the merits of the action, it confesses jurisdiction; appearing specially to deny jurisdiction only, it is met by an order denying its motion for relief from the cog-

nizance of the Court, and has no appeal from that order.

Toland *vs.* Sprague, 12 Pet., p. 330.

There seems but one source of relief, and that lies in the conceded power of this Court to restrain an Admiralty Court from exercising jurisdiction that springs from abuse of its power or unlawful assumption of power.

One of the offices of prohibition is to keep inferior Courts within their proper bounds (Comyn's Digest, vol. 8), and that is needed here.

**III.**—In subdividing the States into Districts by the Judiciary Act of 1789, the legislature intended to prescribe distinct and understood boundaries to each District. To give to the act any fluctuating power would introduce conflict and confusion where certainty was essential.

The Sixth Amendment to the Constitution bears forcibly upon this subject. It was, in common with the other amendments of 1789, adopted in order to "prevent misconstruction," or in other words, to define with certainty. Assuredly the boundaries of a district could not be "ascertained by law," if they were left floating with such local changes as the different States might undergo or determine between each other in the disposition of their respective limits.

**IV.**—In constituting the States of New Jersey and New York, respectively, Districts, the Legislature designed to conform these Districts to the then understood and recognized jurisdictional

limits of the two States. Congress was sitting in 1789 in the City of New York and possessed ample information as to what lines bounded these State jurisdictions when the Districts were created.

It cannot be urged that the "State of New York" was adopted in a general and loose sense, as, in popular expression, for a District, and such District to be subject to the contingent result of a dispute between that State and New Jersey, in respect to boundary lines; such a course would have fallen short of the purpose of ordinary legislation and cannot be presumed to have existed in a species of legislation that above all others addresses itself to precision.

In the formation of districts, Congress was dealing with jurisdictional subjects, and these always involve clear definitions. If any matter may be left to contingent explanations or events, jurisdiction cannot; that must be "ascertained," and certain. In using the "State of New York" as a term, the Legislature had considered and determined upon exact lines as containing that State. True, when the lines may have fallen upon a sea shore or a river subject to ebb and flow of tide, they might not be so geometrically accurate as upon courses and distances, but the logic of law would undergo no violation in that respect.

Low water mark is a certain limit, and if the State of New York had that as one of its boundaries, it sufficed and answered every demand of preciseness.

**V.**—The jurisdiction of the State of New York in 1789, extended to low water mark along the Jersey shore, including the Kill van Kull, and the dis-

trict of New York was co-extensive with such jurisdictional limits of the State.

Whatever may have been the claims of New Jersey to an extension of her governmental or proprietary rights in the early part of this century, or at a time subsequent to the year 1789, it is believed and submitted that no authenticated claim resting upon any right or upon any sound argument to such extension can be found existing during the year 1789, and during the period of a century prior thereto.

It seems clear that in the conveyances made by the Duke of York of the territory of East Jersey, he was governed by the cotemporaneous understanding that the Kill van Kull was a portion of the Hudson river, and that by such conveyances he limited the territory conveyed to the western side of said waters or the shore thereof; that when he bounded East Jersey "in part by the Maine and in part by the Hudson river," he limited the title to the shore of the waters separating Staten Island from New Jersey.

The grant by James must be treated as a Royal Grant, and nothing held by intendment against it or in favor of the grantee.

Martin *et al. vs.* Waddell, 16 Pet., 367.

That Carteret interpreted the conveyance as excluding the waters in question, is evidenced by the license of the Duke to his grandson to use the waters leading to East Jersey for navigation, &c. (Petition, p. 4 *d.*)

This license, however, conferred no governing or jurisdictional power; it was expended in the revenue or navigation privilege it conferred.

Hudson river being thus understood to embrace the Kill van Kull, and entirely excluded from the conveyances by James, remained the property of the latter, and so of the province of New York,

and by conquest through the Revolution of the State of New York.

None of the States enlarged its territorial limits over those in its Provincial character by the mere operation of independence from the sovereignty of the Mother Country, and the rule applied to New Jersey by the U. S. Circuit Court in Corfield *vs.* Coryell, as to the Delaware bay and river, is applicable to the eastern shore of that State upon the waters of the Kill van Kull and Hudson river.

Corfield *vs.* Coryell, 4 Wash., C. C. R., 371.

Handly, Lessee's, *vs.* Anthony, 5 Wheat., 374.

The limits of New Jersey as a province were recognized by the authorities of that State as the shore or low water mark of the waters of the Hudson and New York Bay so-called, inclusive of the Kill van Kull, and continued so to be recognized until the beginning of present century.

See petition pp. 4d, 4f, &c.

Opinion of Judge Elmer, State *vs.* Babcock, 1 Vroom., 32.

**VI.**—The jurisdiction of the State of New York, therefore, in 1789, covered the place of the seizure under consideration here and the District of New York equally covered it and unless some change has been effected by National Legislation in the extent of that district it still embraces it and the District Court of New Jersey has no jurisdiction over it.

State Legislation cannot affect the territorial extent of the Federal Districts, and hence whatever has been done by the respective States of New

York and New Jersey can engage attention only so far as Congress may have determined such acts to be capable of forming the foundations of its definitions of districts.

Congress, however, has not changed the limits of the District of New Jersey, and in its legislation upon the Districts of New York has not altered the extent of the jurisdiction of the districts of that State over the waters in which the place of seizure is situate.

The changes wrought in the District of New York, as existing under the act of 1789, are simply divisions of that district into three districts. No change has been made in the respect of withdrawing from or diminishing the aggregate territorial area of the districts; that is co-extensive with the original district.

The only legislation that can be seriously claimed to have remodelled these original districts is confined to the Revised Statutes. The Revised Statutes, however, were the result of an act (1866) "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings." The statutes organizing the three Districts in the State of New York were certainly statutes "general and permanent in their nature," and were in force in 1873, when the commissioners reported what became in 1874 the Revised Statutes.

Sections 541–542 simply throw into form the prior statutes creating three districts with the precise territorial areas embraced by them before, and the entire area of the District of the State of New York as originally designed by the Act of 1879. The closing paragraph of § 541 is significant in this respect. "The Southern District includes the *residue* of said State with the waters thereof,"

thus centering in the Southern District any portions of the waters that might by possibility be regarded as in doubt under the reference to counties in the constitution of the other districts.

The elaborate reasoning upon this subject by the learned Judge of the Southern District in the case of the Schooner L. W. Eaton, IX Ben. 290, forbids a more extended development of the proposition here.

**VII.**—The District Court of New Jersey has no jurisdiction over the *locus in quo*, and gains no jurisdiction of the petitioner here by the attachment of its vessel lying below low water mark in the Kill van Kull, and should be prohibited from entertaining any such jurisdiction, and a writ of prohibition should issue thereto to that end.

HENRY J. SCUDDER,
*Of Counsel for Petitioner.*

SCUDDER & CARTER,
*Attorneys for Petitioner.*

108-401

# U. S. Supreme Court.

IN THE MATTER

OF

THE PETITION OF THE DEVOE MANUFACTURING COMPANY for a Writ of Prohibition to the U. S. District Court for the District of New Jersey, restraining the said Court from proceeding in the suit of Johnson Hall, libellant, against the Petitioners in admiralty.

*Brief in behalf of Johnson Hall, Libellant.*

The elaborate opinions of the learned and experienced Judges, respectively, of the District Courts of the Southern District of New York and the District of New Jersey, each one following the maxim, "*est boni Judicis ampliare Jurisdictionem*," and supporting the claims of his own State, leave the respective counsel little to add in the full presentment and argument of this motion.

See Hall *vs.* The Devoe Manufacturing Company, Nixon, J., 14 Fed. Reporter, p. 183, and opinion annexed to moving papers; also case of the L. H. Eaton, 9 Benedict, 289, Blatchford, J.

In addition to the above cited cases, there is the case of The United States *vs.* The Ship Julia Lawrence (1860), Betts, J., unreported, but the full text of which appears in the opinion of Judge Blatchford (The L. W. Eaton, *supra*, pp. 291 to 294), and also the case of The People of the State of New York *vs.* The Central Railroad Company of New Jersey, 42 New York Reports, 291. and The State *vs.* Babcock, 1 Vroom, 30.

It is believed that the Court need not go beyond the research and reasonings of the learned Courts writing the opinions in the four cases cited above, to fully comprehend the merits of this motion and reach a satisfactory conclusion.

From a careful reading of these opinions and the legislation therein referred to, the following conclusion is safely reached.

## POINTS.

### I.

That the seizure of the petitioner's vessel was made within the territorial limits of the State of New Jersey; for the vessel was fastened to a wharf built on the New Jersey shore, and to the west of the middle of the Hudson River, the Bay of New York, and of the water between Staten Island and New Jersey.

Now, if we can get at the intent of the Legislature, when the Judiciary Act of 1789 was passed, when they enacted that the New Jersey district was to consist of the "*State of New Jersey*," the whole problem is solved.

At that time the easterly boundary line of New Jersey was in dispute, as between the respective States of New York and New Jersey. New Jersey had always contended that such boundary line extended to the middle of the river, &c., and in 1829 a suit was instituted on behalf of the State of New Jersey, in the Supreme Court of the United States, against the People of the State of New York, and the bill filed alleged that the State of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson River, from the 41st degree of north latitude, to the Bay of New York, to midway of said river, &c., and the whole of Staten Island Sound, together with the land covered by the water of said river, bay and sound to the like extent.

This suit precipitated the calling of the convention of 1833, the result of which was that the State of New York acquiesced in the territorial claim of the People of New Jersey, and the boundary line was fixed as the middle of the river by Act of the State of New York, February 4th, 1834, and approved by Congress of the United States, June 28th, 1834 (4 U. S. Stat. at large, 711),

(See People *vs.* Central R. R., *supra*, p. 292, and p. 20, motion papers herein.)

The natural inference is that the territorial limits or jurisdiction of the United States District Court, for New Jersey, should be co-terminous with the territorial limits of the State of New Jersey. The territorial limits of the State of New Jersey, it had always been contended both by the people of New Jersey and by her Representatives in Congress, at the time of the passage of the Judiciary Act, to be the middle of the river, &c., and in this construction or definition of the "State of New Jersey," the People or State of New York at last acquiesced, and in effect said the territorial limits of New Jersey had been properly defined by the New Jersey fathers.

II.

The cases cited above are sufficient for another conclusion, if indeed it were not evident without, viz.: That the legislation of the State could in no way affect Congressional legislation, in respect to the formation and jurisdictional limits of the respective District Courts.

The State legislation is only to be referred to in arriving at the true intent and meaning of the Judiciary Act, creating the U. S. Judicial District of New Jersey; it furnishes, in other words, a sort of Webster's Dictionary, to ascertain the meaning of the phrase, "*one (district) to consist of the State of New Jersey, and to be called the New Jersey District.*"

"Sec. 2.—The United States shall be divided, and they are hereby divided into thirteen districts to be limited and called as follows: one to consist of the State of New Jersey, and to be called the New Jersey District."

Statutes at Large, Vol. 1, p. 73.
See also U. S. R. S., sec. 530, p. 88.

III.

The territorial limits of the respective States of New York and New Jersey, having been fixed by the convention, another question arose between the States themselves, but which in no way concerned Congress in the passage of the Judiciary Act of 1789, and that was as to the respective jurisdictions of the said States. New York claimed that she should have certain jurisdictional rights over her great commercial port (as she claimed) of New

York. But, here again, if we consider the jurisdictional powers of New York, as distinguished from the territorial limits, the argument of the learned District Judge of New Jersey (Judge Nixon) is strengthened by the fact, that the Convention of 1833 actually conceded and said in effect that New Jersey was right in her claim, to wit, that she should have exclusive jurisdiction over the locus in question.

See 2nd subdivision, article 3 of the Treaty, to wit: "That the State of New Jersey shall have exclusive jurisdiction of, and over the wharves, docks and improvements made and *to be made* on the *shore* of said State, and of and over all vessels fastened to any wharf or dock."

The word "shore" in the foregoing language has been defined to be, not the space between high and low water mark, but the space between *low water mark* and *a line* far enough out into the water for all purposes of docks, piers and wharves.

People *vs.* Central R. R., 42 N. Y., 312.

If the low water mark, as thus defined, is thrown forward by gradual accretion, or by the docks, &c., built or to be built thereon, the jurisdiction of New York, would recede with the low water mark (People *vs.* Central R. R., *supra*, p. 315). Whether the limits of the southern district of New York, as defined by the Act of 1789, would also recede, remains a question. We think, on the whole, that the United States District Court, territorial and jurisdictional limit would also recede with the State, and become co-terminous therewith.

(See Grover, J., People *vs.* The Central R. R., *supra*, p. 315).

It is fair to assume that the Judiciary Act is not to be construed as having fixed, arbitrary and permanent boundary lines. It was never claimed by New York that her western territorial or jurisdictional limit should extend beyond low water mark. The word "low" is a relative term. If, by accretion or otherwise, the "*low*" water line should, in the course of time, be a half a mile further out than it was in 1789, we scarcely think that the southern district of New York could extend a half a mile inward. So, on the other hand, if the shore had receded, as it has done in the vicinity of Sandy Hook, it would hardly be contended that the ancient boundary line was a sort of an imaginary picket fence, beyond which jurisdiction could not be exercised. The intent of the framers of the Judiciary act was undoubtedly that the jurisdiction of the respective District Courts should be co-terminous with that of their respective States. It may be safely assumed, that the intent was that a vessel, fastened to a wharf built on the New Jersey shore, should, in 1789, or at any other time, be within the jurisdiction of the United States New Jersey Judiciary District.

## IV.

We believe that no fair argument can be urged here, that the true intent and meaning of the Legislature when they, in 1789, said that the District of New Jersey was to consist of the State of New Jersey, was that the District Court of New Jersey should be absolutely deprived of all jurisdiction over every part of her water front or seaboard adjoining the State of New York below low water mark, as it then existed. No reasonable grounds can be given for the support of such proposition. The United States were in

no way concerned with the dispute between the respective States. It was a purely domestic affair as to whether New York should have control of the harbor and port. It seemed best that jurisdiction, police and otherwise, should be conferred on one or the other. But it was expressly provided in the Act of Congress, June 28, 1834, approving the Treaty of 1833, that the agreement should not be construed to impair or in any manner affect any right of jurisdiction then existing of the United States in and over the waters which formed the subject of said agreement.

V.

The motion for a Writ of Prohibition should be denied.

FRANKLIN A. WILCOX,
*Of Counsel for Libellant Hall.*

BEEBE, WILCOX & HOBBS,
*Libellant's Proctors.*